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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 654

CLAY E. HUNTER, *Petitioner*

v.

STATE OF OHIO, EX REL. ROY E. MILLER, THE STARK COUNTY BOARD OF ELECTIONS, TED W. BROWN, Secretary of State, *Respondents*

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Clay E. Hunter prays for leave to intervene and further prays that a writ of certiorari be granted to review the judgment of the Supreme Court of Ohio entered in *State ex rel. Miller* v. *Gwin* on June 18, 1969.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio in *State ex rel. Miller* v. *Gwin* is printed at Appendix B hereto, p. 10a, *infra,* and is reported at 18 Ohio St. 2d 66 (1969). The opinion of the Supreme Court of Ohio in *State ex rel. Graves* v. *Brown* is printed at Appendix B, pp. 11a to 13a, *infra,* and is reported at 18 Ohio St. 2d 61 (1969). The opinion of the Attorney General of Ohio is printed at Appendix B, pp. 13a to 20a, *infra,* and is reported at 1968 O.A.G. (Ohio) 110.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 18, 1969. On September 16, 1969, petitioner applied for a time extension to file this petition and on September 17, 1969, Mr. Justice Stewart extended the time to file this petition until October 16, 1969, "without prejudice to the Court's consideration of the standing of the applicant as a petitioner in this case." This Court has jurisdiction under 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

The Supreme Court of Ohio has ruled that petitioner, a sitting judge over the age of 70, is ineligible to seek re-election in November of 1969 despite the fact that the Ohio legislature proposed to the Ohio voters in 1968 a lengthy revision of the Ohio Constitution that *inter alia* would have permitted such sitting judges to be re-elected until 1971. The court held that this proposal was not before the voters or adopted by them inasmuch as it was not specifically mentioned in the fifteen line summary of the extensive revisions that appeared on the ballot in 1968. The questions presented are:

(1) Does petitioner, who was not made a party to the original action in the Supreme Court of Ohio and who was denied intervention following that court's declaration of his ineligibility have sufficient legal interest and standing to seek and be granted a writ of certiorari in this Court to review the Ohio court's ruling, where none of the parties to the original action seek review by this Court?

(2) Are the voters of Ohio denied the due process of law guaranteed by the Fourteenth Amendment by having their right to enact state constitutional amendments and to vote for state judges of their own choosing effectively diluted by an arbitrary state court ruling that only those matters referred to in a brief condensation on the ballot of extensive constitutional changes proposed to the voters by the state legislature can be considered adopted?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Sec. 1, Amendment 14, United States Constitution; Article IV, and Sec. 1 of Article XVI of the Ohio constitution; and § 3505.06, Revised Code of the State of Ohio. These are reprinted at Appendix A, *infra,* pp. 1a to 9a.

STATEMENT OF THE CASE

Petitioner is a duly elected, qualified judge of the Municipal Court of the City of Canton, Ohio, and his term expires January 2, 1970. Petitioner is 74 years of age. On January 22, 1969, petitioner filed nominating petitions for the position of judge of the Municipal Court of Canton, Ohio, with the Board of Elections of Stark County, Ohio. Since no other candi-

date took out or filed nominating petitions for the May primary, petitioner was declared a candidate for the general election to be held in November 1969.

The case arose on the following undisputed facts: In March 1968 the legislature of the State of Ohio by Joint Resolution adopted a proposed comprehensive revision to Article IV of the constitution of the State of Ohio (Appendix A, *infra,* pp. 1a to 8a) relative to the administration and organization of the courts of Ohio. Included was a provision barring judges beyond the age of 70 from holding office; however, a "grandfather clause," Section (E) of the "Schedule," permitted judges, regardless of age, to seek re-election until after 1970, to wit:

> EFFECTIVE DATE AND REPEAL
>
> If adopted by a majority of the electors voting on this amendment, the amendment except paragraph (B) of the Schedule shall take effect January 10, 1970, and existing sections 1 and 2, and sections 3, 4, 6, 7, 8, 10, 12, and 14 of Article IV of the Constitution of Ohio shall be repealed from such effective date. Paragraph (B) of the Schedule and the repeal of sections 12 and 13 of Article XI adopted in 1851, shall become effective immediately upon the adoption of this amendment by the electors of this state.
>
> SCHEDULE
>
> Upon the effective date of this amendment:
>
> * * * * *
>
> (E) Any judge who is holding office on December 31, 1969, and who would be eligible for re-election in 1970 for a term beginning in 1971 except for his age and the provisions of division (C) of Sec-

tion 6, Article IV, shall be eligible nevertheless to be re-elected in 1970 for one additional term as judge of the same court.

In accordance with Section 1, Article XVI of the Ohio Constitution (Appendix A, p. 9a, *infra*), the proposed constitutional amendment was published in its entirety for five consecutive weeks in newspapers of general circulation in every county of the State of Ohio, and under the provisions of § 3505.06 Revised Code of Ohio was posted at each polling place on election day. The Resolution was put before the voters and adopted on May 7, 1968.

The proposed amendment appeared on the ballot as a fifteen-line summary of the six printed page Joint Resolution in the following form:

PROPOSED CONSTITUTIONAL AMENDMENT ADMINISTRATION AND ORGANIZATION OF OHIO JUDICIAL SYSTEM

(Proposed by Resolution of the General Assembly of Ohio)

A majority affirmative vote is necessary for passage.

Shall the Constitution of the State of Ohio be amended by amending Sections 1 and 2, enacting Sections 3, 4, 5 and 6 and repealing existing Sections 3, 4, 6, 7, 8, 10, 12 and 14 of Article IV and by repealing Sections 12 and 13 of Article 11 as adopted in 1851 to provide that the Supreme Court shall decide all cases by majority vote, to fix the power of the Supreme Court of Ohio to exercise administrative supervision over all courts and to make rules of practice and procedure, to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years, to equalize judges' salaries and to allow increases in compensation during term, to

> remove the Probate Court as a constitutional court and to authorize the consolidation of county Probate Courts and Courts of Common Pleas?

(Appendix C, p. 20a, *infra*). The summary did not specifically refer to Section (E) of the "Schedule," the "grandfather clause" which permitted judges over the age of 70 to run for re-election until 1971.

Respondent Roy E. Miller, in his status as a qualified voter and taxpayer, filed an original action in the Supreme Court of Ohio on May 15, 1969, seeking a Writ of Prohibition to prohibit the Stark County Board of Elections from placing petitioner's name on the ballot, naming as parties the Board of Elections and the Secretary of State. Petitioner was not made a party to the action. The Supreme Court of Ohio on June 18, 1969 granted the Writ of Prohibition on the authority of its decision in *State ex rel. Graves* v. *Brown,* 18 Ohio St. 2d 61 (1969) (Appendix B, pp. 11a, *infra*), a review of which is necessary to the understanding of this case.

State ex rel. Graves v. *Brown, ibid,* was also an original action for Writ of Prohibition filed in the Supreme Court of Ohio. The case was filed on March 28, 1969, to remove the name of Judge Stephen A. Zona from the ballot in the May 6, 1969 primary as a Democratic candidate for nomination for the office of judge of the Municipal Court of Parma, Ohio. On April 30, 1969, the court granted the writ for the reason that no reference to Section (E) of the Schedule, the "grandfather clause," appeared on the condensed ballot text prepared by the Secretary of State, and therefore the issue was not before the voters. The Court ruled:

> If the General Assembly had intended that Section (E) be given effect, it could have provided

that the question of postponement be submitted to the electorate as a part of the condensed ballot text. The failure to so have presented the question to the electorate destroyed the efficacy of Section (E) of the schedule.

The denial of the constitutional rights of petitioner and all voters was adequately raised during the litigation. In the Demurrer and Brief of respondent, the Stark County Board of Elections, it was stated at pp. 6-9:

> Recognizing the possibility that this Court will determine that the decision of *State ex rel Graves vs Brown, supra,* will require that the court prohibit the Board of Elections of Stark County from issuing a certificate of nomination to the Honorable Judge Clay E. Hunter, then the question that arises is whether under the circumstances as set forth in the Agreed Statement of Facts the Democratic party by its central committeemen shall be permitted to substitute a candidate for Judge Hunter on the ballot for the November, 1969, general election, pursuant to *R. C. 3513.31.*
>
> It should be noted at the outset that the Democratic voters at the May, 1969, primary had no opportunity whatsoever to cast a ballot for a candidate as a representative of their party for the November, 1969, election. In view of the fact that Judge Hunter was the only candidate filing petitions pursuant to the law, no ballot was submitted to the electorate so they did not even have the opportunity to write in a candidate and vote for him. The Board of Elections in not providing ballots for the Democratic party voters was following the mandate of *R. C. 1901.07* and *R. C. 3513.02.* At the time the Board of Elections made the decision to consider Judge Hunter as the only candidate for the Democratic party for the nomination so as to eliminate the necessity of providing

a ballot for the Democratic voters, the Stark County Board of Elections was operating in compliance with the Opinion No. 68-110 of the Attorney General of the State of Ohio issued July 5, 1968, [Appendix B, pp. 13a to 20a, *infra*] and also in compliance with the directive of Secretary of State Ted W. Brown in his bulletin dated January 15, 1969, as set forth in the Agreed Statement of Facts.

The subsequent decision of this court in *Graves* v. *Brown, supra,* was not to come until the 30th of April, 1969.

* * * *

It is submitted that a strict interpretation of the provisions of *R. C. 3513.31* in this unique factual situation would be in direct conflict with the "Right to Vote" as described and stressed by the Supreme Court of the United States in its October, 1968, decision permitting the Ohio American Independent Party's Presidential candidate George Wallace the right to be on the Ohio, 1968, Presidential ballot despite the party's failure to comply with the Ohio election laws. *Williams vs Rhodes,* 37 LW 4001, October 15, 1968.

In delivering the opinion of the Supreme Court, Judge Black stated in part as follows:

> "... In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, or course, rank among our most precious freedoms. . . . Similarly we have said with reference to the right to vote: 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even

> the most basic, are illusory if the right to vote is undermined'. . . . The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote. . . ."

The respondent (relator below) Roy E. Miller argued in his Reply Brief (pp. 3-4) that the action of the legislature and voters postponing the effective date of the age limitation "was a nullity" in view of *State ex rel Graves* v. *Brown*. The Supreme Court of Ohio, in granting the Writ of Prohibition in the instant case, simply cited *State ex rel Graves* v. *Brown* as authority and did not respond to the constitutional issues raised by the respondent, Board of Elections.

When petitioner became informed that none of the named party respondents intended to proceed further with an appeal, he filed an Application to Intervene in the Supreme Court of Ohio on August 13, 1969, so that he could file an appeal or petition for certiorari to this Court. The Application to Intervene was denied without comment on Friday, September 12, 1969, and petitioner applied for reconsideration of the denial to intervene on Monday, September 15, which was also denied on Tuesday, September 16, 1969.

REASONS FOR GRANTING INTERVENTION AND THE WRIT OF CERTIORARI

A. The petitioner has standing to seek review of the ruling of the Supreme Court of Ohio even though he was not a party to that action

An original action was brought in the Supreme Court of Ohio naming the Stark County Board of Elections and the Secretary of State as respondents, with the purpose of removing petitioner's name from the ballot for the office of Municipal Judge. He, however, was

not made a party. Petitioner relied upon the named respondents to represent his interests and the interests of all other Ohio voters. However, after an adverse decision ruling petitioner off of the ballot, he was notified by the Board of Elections and the Secretary of State that they would not seek review in the Supreme Court of the United States. Petitioner thereafter applied to the Supreme Court of Ohio for leave to intervene on August 13, 1969, for the purpose of seeking review by the Supreme Court of the United States, and that application was denied on Friday, September 12. The petitioner applied for reconsideration of the denial to intervene on Monday, September 15, 1969. Not having been advised by the Ohio court by the morning of Tuesday, September 16, 1969, the ninetieth day from judgment, petitioner filed in this Court an application for leave to intervene and for an extension of time in which to petition for certiorari. On September 17 Mr. Justice Stewart granted an extension of time until October 16 "without prejudice to the Court's consideration of the standing of the applicant as a petitioner in this case." On the afternoon of Tuesday, September 16, 1969, upon reconsideration, the Supreme Court of Ohio denied the petitioner leave to intervene.

There is no question that petitioner has standing to complain of the Ohio court's ruling. The test as stated in *Baker* v. *Carr*, 369 U.S. 186, 204 (1962) is:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.

Since it was the petitioner's name and his alone that has been removed from the ballot by the ruling of the Supreme Court of Ohio, he unquestionably has a personal stake in the outcome of the controversy. Petitioner asserts his rights, however, not only as a candidate for office but as a citizen of the State of Ohio on his own behalf and on behalf of all other citizens and voters of the State of Ohio. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186, 206-208 (1962); *Barrows* v. *Jackson*, 346 U.S. 249, 255-58 (1953).

Petitioner recognizes that the more usual course of action would be to seek review of the denial of the application to intervene. However, since Judge Hunter's contested election is on November 4, 1969, such an appeal, even if successful, would be meaningless. "A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court." *McKenna* v. *Pan American Petroleum Corp.*, 303 F. 2d 778, 779 (5th Cir. 1962), vacated on other grounds, 384 U.S. 63 (1966). Intervention may be granted after entry of a final decree if it is necessary to preserve some right which cannot otherwise be protected. *United States* v. *Northern Securities Co.*, 128 Fed. 808 (C.C. S.D. Minn. 1904), aff'd on other grounds, 193 U.S. 197 (1904). Petitioner submits that imperative reasons exist in this case: (1) the action appealed from was an original action in the Supreme Court of Ohio and there is no intermediate appeal below this Court; (2) the Supreme Court of Ohio delayed until the last moment in acting on Judge Hunter's petition to intervene, thereby prejudicing his right to seek earlier review; (3) respondents in the lower court, the Board

of Elections and the Secretary of State, have done nothing to appeal the ruling adverse to them and to protect the rights of petitioners and of the voters of Ohio. E.g., *Wolpe* v. *Poretsky,* 144 F.2d 505 (D.C. Cir. 1944), cert. denied, 323 U.S. 777 (1944). (Intervention permitted after judgment where a zoning board failed to appeal an adverse decision prejudicing the rights of effected property owners.) This Court has also permitted intervention after judgment (although at the trial level), where public authorities failed to enforce the rights of private individuals, stating:

> Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the nisi prius court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion. *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U.S. 502, 506 (1941).

This Court has recently permitted intervention in order to present a petition for certiorari and has thereupon granted a writ of certiorari in circumstances identical to the instant case, in *Banks* v. *Chicago Grain Trimmers Assoc.,* 390 U.S. 459 (1968). In that case, after a claim under the Longshoremen's and Harbor Workers' Compensation Act was the subject of an award to Mrs. Banks, the insurance company instituted an action in the United States District Court against the Deputy Commissioner of Labor, without naming

Mrs. Banks as a party. After losing in the District Court, the insurance company appealed and obtained a reversal from a Court of Appeals. Mrs. Banks did not intervene either in the District Court or the Court of Appeals. The Government, through the Solicitor General, declined to file a petition for writ of certiorari on the ground that no substantial federal question was involved, leaving Mrs. Banks in the same position as petitioner here: the government agency which had been representing her interests and which was a party declined to appeal the decision. Mrs. Banks' unsuccessful attempts to intervene in the lower courts were not made until after an extension of time for filing a petition was granted to her by a Justice of this Court. See, Petition for Leave to Intervene and Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 59—Oct. Term 1967.)

This Court invited the Solicitor General to file a brief expressing the views of the United States. 386 U.S. 1002 (1967) Mr. Justice Marshall (then Solicitor General) filed a Memorandum for the Deputy Commissioner (Department of Labor), supporting Mrs. Banks' petition to intervene, stating at pp. 2-3:

> 1. There is a threshold question whether this Court has jurisdiction to grant a writ of certiorari as prayed for in the petition. While it is true that "any party" may file a petition (28 U.S.C. 1254(1)), petitioner was not formally made a party in the proceedings below. She did not seek leave to intervene until after the judgment of the court of appeals was rendered, and the motion to intervene which she then filed was denied by the district court. On the other hand, the procedure

whereby the award is defended by the government in the courts is not designed to vindicate any independent governmental interest, but, rather, to remove the burdens of litigation from the shoulders of the compensation claimants, who are rarely individuals of means. In a practical sense, therefore, the claimant is the real party in interest in the judicial proceedings even if not formally named, and it would not appear unreasonable to deem petitioner a party below for purposes of entitlement to file a petition for a writ of certiorari.[1]

[1] Alternatively, if petitioner could be said to have perfected an appeal to the court of appeals from the order of the district court denying intervention, the petition could be viewed as seeking review not only of the court of appeals' judgment but also of the refusal to permit her to intervene. In that event, if the Court agreed that intervention was wrongly denied (and we can think of no sound reason for denying intervention to petitioner), it would be free also to consider the merits of the judgment below. *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Co.*, 386 U.S. 129.[1]

This Court granted the petition for intervention and for writ of certiorari, 389 U.S. 813 (1967), and decided the case on the merits, 390 U.S. 459 (1968).[2]

[1] In the *Banks* case, jurisdiction was asserted under 28 U.S.C. § 1254(1) which provides that "any party" may file a petition. That action did not deter the Court from granting the petition for writ of certiorari. In the instant case such problem does not exist since jurisdiction is invoked under 28 U.S.C. 1257 which imposes no requirement, that only "a party" may petition for writ of certiorari or appeal.

[2] Cf. *Eastern-Central Motor Carriers Ass'n.* v. *United States*, 321 U.S. 194, 199, n. 5 (1944), and *N. L. R. B.* v. *Acme Industrial Co.*, 384 U.S. 925 (1966), where intervention in cases already pending before this Court was allowed to persons who had not been parties to the proceedings below but who had a vital interest in the eventual resolution of the cases.

Petitioner submits that he has a personal stake in the outcome of this controversy, that imperative reasons exist for permitting him to intervene at the appellate level, that his rights, and the rights of all voters, have not been safeguarded by the respondent-governmental agencies, and that this Court has in the past for such reasons permitted intervention in order to present to this Court a petition for writ of certiorari and to have it considered on its merits.

B. The voters right to select their form of government and to elect their public officials has been denied without due process of law

The will of the voters of Ohio in making their laws, choosing their form of government, and selecting their public officials, has been effectively nullified by the decision of the Supreme Court of Ohio. The right to vote is a "fundamental political right" that is "preservative of all rights." *Williams* v. *Rhodes,* 393 U.S. 1, — 21 L.Ed. 2d 24, 36 (1968) (Justice Douglas concurring); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). This Court has further stated:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote. . . . The right to vote can neither be denied outright . . . nor destroyed by alteration of ballots . . . nor diluted. . . . The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right

strike at the heart of representative government. *Reynolds* v. *Sims*, 377 U.S. 533, 554-55 (1964).

The voters and citizens of Ohio have chosen a Republican form of government by electing their State legislature, and by designating it to be their representative for enacting the laws of the State. Cf. *Baker* v. *Carr*, 369 U.S. 186, 222, n. 48 (1962); *Minor* v. *Happersett*, 21 Wall (U.S.) 162, 175-76 (1875). The legislature of Ohio, by Joint Resolution of both Houses, proposed a revision to the Judicial Article of the Ohio constitution, effecting such matters as the jurisdiction of the courts, the regulation of the practice of law, the division of the State into appellate districts and the organization of the courts in such districts, the organization of courts of inferior jurisdiction, the election of judges to all courts, and the procedures and qualifications of candidates for judicial office. Included in the Joint Resolution was a provision making the Amendment, if approved by the voters, prospectively operative. Also included was a savings clause denoted "Schedule," concerning cases, judges holding office, and rules of practice pending at the time of the adoption of the constitutional article.

The Ohio constitution, Article XVI, provides that the source of proposed constitutional changes shall be either in the legislature as approved by the electorate through a referendum or by constitutional convention. After having been published in newspapers of general circuation throughout the State for five consecutive weeks in accordance with that article, and posted at the polls on election day pursuant to section 3505.06 of the Revised Code of Ohio, the proposed revision was put before the voters and approved on May 7, 1968. The Supreme Court of Ohio has here ruled that the

condensed version of a proposed constitutional amendment, prepared by the Secretary of State, as it appears on a sample ballot presents the only issues which can be adopted by the voters of Ohio.

It has now been held that only those matters which appeared in the fifteen-line condensed ballot text were before the voters and that if the General Assembly of Ohio had wanted more to be on the ballot, it could have told the Secretary of State to include it as part of the condensed ballot text. *State ex rel. Graves* v. *Brown,* 18 Ohio St. 2d 61 (1969). Obviously the Ohio legislature wanted the entire amendment to be on the ballot; otherwise it would not have gone to the futility of proposing it and instructing the Secretary to put it before the voters.

The court's ruling, in effect, gives the Ohio Secretary of State the power to propose amendments to the constitution of the State of Ohio and to veto actions of the Ohio legislature in violation of the provisions of the constitution of the State of Ohio, simply by the way he phrases the ballot summary. This ruling deprives the Ohio legislature of the power granted to it by the Ohio constitution to propose constitutional amendments, and deprives the petitioner and all other voters of Ohio of due process of law in that their will, expressed at the ballot box, has been and may be controlled or denied by administrative action of the Secretary of State.

The Court's opinion in the instant case, *Ohio ex rel. Miller* v. *Gwin,* Ibid., in *State ex rel. Graves* v. *Brown,* Ibid., and in *City of Euclid* v. *Heaton,* 15 Ohio St. 2d 65, 238 N.E. 2d 790 (1968), has now overruled the voters' desires regarding the manner by which they

select their judges, and has prevented their voting on particular judges who are running.[3]

The federal constitutional right, of course, relates to the voter's right to have his vote made effective and counted in an undiluted manner as to all propositions and candidates properly on the ballot. In the context of this case, that federal due process right means that the Ohio voters had the right to have their votes counted as to the entire provisions of the constitutional amendments properly put before them in the 1968 ballot and to have their votes fully counted as to the judicial candidates qualified to be on the 1969 ballot. But that right was diluted and the votes made ineffective by the unreasonable process of limiting the scope of the votes in terms of the omissions, dictated by space limitations on the ballots, that the Ohio Secretary of State intentionally or unintentionally made in the ballot summarization. In the constitutional sense, the ruling below is no different than if it prohibited or outlawed all votes cast for an express proposition on the ballot permitting re-election of all sitting judges who are 70 years or older. The Fourteenth Amendment should not permit a state court to deprive state

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[3] In *Euclid* v. *Heaton* the Court ruled that since the proposed effective date of the proposed amendment was also not in the condensed text, all of its provisions took effect immediately, thereby allowing a simple majority of the Supreme Court rather than a six-judge concurrence to reverse the judgment in a criminal case. The decision in *Euclid* v. *Heaton* had additional and perhaps unexpected ramifications since the proposal making the effective date of the amendment 1971 was nullified. All provisions took effect immediately, thereby allowing an immediate increase in the salaries of judges in 1968 rather than January 1, 1970 as the General Assembly had stipulated. The effect upon the Supreme Court Justices was to give them a $6,000 pay raise eighteen months sooner than the General Assembly had intended. *See,* "Here Come the Judges," *Toledo Blade,* June 24, 1968, p. 12, col. 2.

voters of the right to vote for and adopt changes in their form of government.

The issues raised and the effect upon the administration and organization of the Ohio judicial system are extremely grave. There are four judges above the age of 70 now running for re-election in Ohio. There are at least seven above the age of 70 who are eligible to seek re-election in 1970. There are eight judges presently serving who were re-elected in November 1968 whose ages exceed 70 years and whose offices can now be brought under attack since they were elected after the adoption by the voters of the revised judicial amendment to the Ohio constitution. Also, decisions rendered by these eight re-elected judges are now under a cloud and will be subject to reopening and attack. At least one such decision has already been challenged on the ground that the judge was not lawfully seated. Motion for Rehearing, *Stillmaker* v. *Department of Liquor Control,* 18 Ohio St. 2d —, June 18, 1969.

The condensed ballot text described few changes to the Ohio Constitution. In view of the Ohio Supreme Court's current analysis, other sections dealing with the jurisdiction of the appellate courts, the constitutional right to file original actions, the creation of the courts and the control of the practice of law, for example, are all invalid because they were not included by the Secretary of State in the condensed ballot text.

There is no justifiable state interest advanced by the Supreme Court of Ohio in any of the cases decided by it construing the phrasing of the ballot text which would justify that court's interpretation. Its decision, then, must be considered arbitrary in the constitutional sense, depriving the voters of Ohio their cherished right of full and effective suffrage without due process of law.

This Court has not heretofore had occasion to examine definitively the extent of the right of state voters, under the Due Process Clause of the Fourteenth Amendment, to cast their votes effectively and without dilution. The recent voting right cases have all arisen under the Equal Protection Clause, involving discriminatory exclusions of types of voters or other discriminatory dilutions of their voting power. But conceptually and practically the Due Process Clause contains no exclusion or exception as to voting rights of state voters. Those rights, as well as any other aspect of liberty, can effectively be denied without due process of law and by arbitrary means. The plain denial of such effective voting rights that has occurred in this case affords an opportunity for this Court to make the right to vote, the right that is so fundamental to our way of life, even more effective by extending to it the principles of the Due Process Clause.

CONCLUSION

For the foregoing reasons this petition for leave to intervene and petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Section 1, Amendment 14

Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. IV, Constitution of the State of Ohio

(Amended Substitute House Joint Resolution No. 42)

JOINT RESOLUTION

Proposing to amend sections 1 and 2, to enact sections 3, 4, 5, and 6, and to repeal sections 3, 4, 6, 7, 8, 10, 12, and 14 of Article IV, and sections 12 and 13 of Article XI as adopted in 1851, of the Constitution of the State of Ohio, relative to administration and organization of the courts of Ohio.

Be it resolved by the General Assembly of the State of Ohio, three-fifths of the members elected to each house concurring therein, that there shall be submitted to the electors of the state in the manner prescribed by law at a special election to be held on the first Tuesday after the first Monday in May, 1968 a proposal to amend sections 1 and 2, to enact sections 3, 4, 5, and 6, and to repeal sections 3, 4, 6, 7, 8, 10, 12, and 14 of Article IV, and sections 12 and 13 of Article XI as adopted in 1851, of the Constitution of Ohio to read as follows:

Section 1. The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, * * * and such other courts inferior to the * * * *supreme court* as may from time to time be established by law.

Section 2. (*A*) The supreme court shall, until otherwise provided by law, consist of * * * *seven* judges, * * * *who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice.* If any * * * *member of the court* shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice * * * *or the acting chief justice* may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. * * * A majority of the supreme court shall be necessary to constitute a quorum or to * * * *render a judgment.*

* * * *(B) (1) The supreme court* shall have original jurisdiction in * * * *the following:*

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction * * * *as follows:*

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state * * *.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained * * *.

(c) Such revisory jurisdiction of the proceedings of administrative officers *or agencies* as may be conferred by law * * *;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;.

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.
* * *

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

Section 3. (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

Section 4. (A) There shall be a court of common pleas in each county of the state. Any judge of a court of common pleas may temporarily hold court in any county. Each county shall have at least one resident judge and such additional resident judges as may be provided by law. In counties having more than one judge, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas

shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division of the courts of common pleas, and judges shall be elected specifically to such probate division and shall be empowered to employ and control the clerks, employees, deputies and referees of such probate division of the common pleas courts.

Section 5. (A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas temporarily to sit or hold court on any other court of common pleas or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of comomn pleas. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Section 6. (A) (1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate district, for terms of not less than six years.

(3) The judges of the courts of common pleas shall be elected by the electors of the counties in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas shall reside dur-

ing his term of office in the county in which his court is located.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the supreme court, courts of appeals, and of the courts of common pleas, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges shall receive such compensation as may be provided by law. Judges shall receive no fees or prerequisites, nor hold any other office of profit or trust, under the authority of this state or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

EFFECTIVE DATE AND REPEAL

If adopted by a majority of the electors voting on this amendment, the amendment except paragraph (B) of the Schedule shall take effect January 10, 1970, and existing sections 1 and 2, and sections 3, 4, 6, 7, 8, 10, 12, and 14 of Article IV of the Constitution of Ohio shall be repealed

from such effective date, Paragraph (B) of the Schedule and the repeal of sections 12 and 13 of Article XI adopted in 1851, shall become effective immediately upon the adoption of this amendment by the electors of this state.

SCHEDULE

Upon the effective date of this amendment:

(A) Provision shall be made by law for the disposition of all pending cases in accordance with the procedural law in effect at the time of the effective date of this amendment.

(B) In accordance with the provisions of this article, the general assembly shall enact such laws and the supreme court shall promulgate such rules as will give effect to the provisions herein.

(C) All laws and rules of court in existence upon the effective date of this amendment shall continue in effect until superseded or changed in the manner authorized by this amendment.

(D) All judges of the probate courts shall become judges of the courts of common pleas.

(E) Any judge who is holding office on December 31, 1969, and who would be eligible for re-election in 1970 for a term beginning in 1971 except for his age and the provisions of division (C) of Section 6, Article IV, shall be eligible nevertheless to be re-elected in 1970 for one additional term as judge of the same court.

CHARLES F. KURFESS,
Speaker of the House of Representatives.

JOHN W. BROWN
President of the Senate.

Adopted March 1, 1968.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 8th day of March, A.D. 1968.

/s/ TED W. BROWN
TED W. BROWN,
Secretary of State.

File No. 18.

Constitution of the State of Ohio

ARTICLE XVI

AMENDMENTS

1. This constitution may be amended and how.

Either branch of the general assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be submitted to the electors, for their approval or rejection, on a separate ballot without party designation of any kind, at either a special or a general election as the general assembly may prescribe. Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately. (Adopted Sept. 3, 1912.)

Revised Code of the State of Ohio

Section 3505.06, Revised Code, provides in part:

"The questions and issues ballot need not contain the full text of the proposal to be voted upon. A condensed text that will properly describe the question, issue, or amendment shall be used as prepared and certified by the secretary of state for state-wide questions or issues or by the board for local questions or issues. If such condensed text is used, the full text of the proposed question, issue, or amendment together with the percentage of affirmative votes necessary for passage as required by law shall be posted in each polling place in some spot that is easily accessible to the voters."

APPENDIX B

THE STATE OF OHIO,
City of Columbus.

1969 *TERM*

The State of Ohio, ex rel.
Roy E. Miller,
Relator,

To wit: Wednesday, June 18, 1969

vs.

John F. Gwin et al., Stark County
Board of Elections and Ted W. Brown,
Secy. of State,
Respondents.

No. 69-321
IN PROHIBITION

This cause originated in this Court upon the filing of a petition for a writ of prohibition. An answer to the petition was filed by Respondent Secretary of State, a demurrer and brief by Respondents Board of Elections and a reply brief by the Relator, and this cause was heard in the manner prescribed by law.

On consideration thereof, the writ of prohibition is hereby allowed on authority of State, ex rel. Graves, v. Brown, 18 Ohio St. 2d 61, prohibiting board of elections from placing name of Clay E. Hunter on the November ballot as a candidate for Judge of the Canton Municipal Court. Consideration of the further relief prayed for is premature.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18 day of June, 1969.

THOMAS L. STARTZMAN *Clerk*
By SAM F. ADKINS *Deputy*

The State, ex rel. Graves, v. Brown, Secy. of State, et al.

[Cite as State, ex rel. Graves, v. Brown, 18 Ohio St. 2d .]

(No. 69-217 — Decided April 30, 1969.)

IN PROHIBITION.

This is an original action filed in this court seeking a writ of prohibition to prevent the Secretary of State and the members of the Cuyahoga County Board of Elections, as respondents, from placing the name of Stephen A. Zona upon the ballot, as a Democratic candidate for nomination for the office of Judge of the Parma Municipal Court for a term commencing January 1, 1970, in the primary election to be held May 6, 1969.

It is stipulated that Judge Zona (who is currently serving on the Parma municipal bench) was 70-years old January 6, 1969, and it is alleged in the petition that he would be more than 70 years of age when he would take office if successful in the general election, in violation of Section 6(C) of Article IV of the Ohio Constitution.

The motion of Judge Zona to intervene as a party respondent was allowed, and the cause was submitted on April 25, 1969, for decision upon relator's motion for judgment on the pleadings.

Mr. Harvey O. Mierke, Jr., and *Mr. Frederick J. Payne*, for relator.

Paul W. Brown, John L. Dowling, for respondents.

Messrs. Saker, Yannon & Sferrella and Mr. Theodore R. Saker, for intervenor-respondent.

Per Curiam. Section 6(C) of Article IV of the Ohio Constitution, adopted by the voters on May 7, 1968, provides in part:

"No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of his duties he shall have attained the age of seventy years."

Section (E) of the schedule of the foregoing amendment states:

"(E) Any judge who is holding office on December 31, 1969, and who would be eligible for re-election in 1970 for a term beginning in 1971 except for his age and the provisions of division (C) of Section 6, Article IV, shall be eligible nevertheless to be re-elected in 1970 for one additional term as judge of the same court."

No reference to the import of Section (E) of the schedule appeared in the condensed ballot text prepared pursuant to Section 3505.06, Revised Code.

In the case of *Euclid* v. *Heaton* (1968), 15 Ohio St. 2d 65, 238 N. E. 2d 790, this court followed the case of *State, ex rel. McNamara*, v. *Campbell* (1916), 94 Ohio St. 403, 115 N. E. 29, and held that unless a postponement of the effective date of a proposed constitutional amendment is submitted to the voters, Section 1 of Article XVI of the Ohio Constitution requires that the amendment become a part of the Constitution upon the date of its adoption by the voters. Logic and consistency dictate that this result must also obtain where the effectiveness of a portion of an amendment is sought to be delayed.

Section (E) of the schedule represents an attempt to postpone the effective date of a part of the constitutional amendment. If the General Assembly had intended that Section (E) be given effect, it could have provided that the question of postponement be submitted to the electorate as a part of the condensed ballot text. The failure to so have presented the question to the electorate destroyed the efficacy of Section (E) of the schedule. Therefore, relator's motion for judgment upon the pleadings is sustained and the writ of prohibition is allowed.

Writ allowed.

MATTHIAS, Acting Chief Justice, COLE, O'NEILL, SCHNEIDER, and HERBERT, JJ., concur.

JONES and DUNCAN, JJ., dissent.

COLE, J., of the Third Appellate District, sitting for TAFT, C.J.

JONES, J., of the Eleventh Appellate District, sitting for ZIMMERMAN, J.

OPINION NO. 68-110

Syllabus:

A judge who is currently holding office and who otherwise would be eligible for re-election is not disqualified from running for re-election in November, 1968, for the reason that he will have attained the age of seventy years by the time he would assume the office for the term to which he was re-elected.

To: Ted W. Brown, Secretary of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, July 5, 1968

I have before me your request for my opinion wherein you inquire whether a judge who is currently holding office and who would be otherwise eligible for re-election, is disqualified from running for re-election in November, 1968, by the passage of Amended Substitute House Joint Resolution No. 42 at the special election held May 7, 1968, if he will have attained the age of seventy years by the time he would assume the office for such term to which he was re-elected.

There was submitted to the electors of Ohio on May 7, 1968, Amended Substitute House Joint Resolution No. 42 which included a proposal to enact Section 6 of Article IV of the Ohio Constitution and a "Schedule" which contained a limited exception from the operation of Section 6 of Article IV, *supra,* for certain judges.

Section 6(C) of Article IV of the Ohio Constitution proposed by Amended Substitute House Joint Resolution No. 42 provides, in part:

> "(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. * * *"

The amendment proposed by Amended Substitute House Joint Resolution No. 42 received a majority of the votes of the electors voting on the question.

Section 1 of Article XVI of the Ohio Constitution provides, in part:

> "* * * Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendment the same shall become a part of the constitution. * * *"

The Ohio Supreme Court, in *Euclid* v. *Heaton*, Case No. 41178, 15 Ohio St. (2d), 65, decided June 19, 1968, held that Section 1 of Article XVI, *supra*, and its earlier case *State, ex rel. McNamara* v. *Campbell*, 94 Ohio St., 403, required that an amendment of Section 2, Article II to the Constitution proposed by the General Assembly pursuant to the authority of Section 1 of Article XVI, *supra*, became effective on May 7, 1968, the date upon which it received the votes of a majority of the electors voting on the question in the special election in which it was submitted.

The first paragraph of the syllabus in the case of *State, ex rel. McNamara* v. *Campbell*, 94 Ohio St., 403, reads:

> "A provision in a joint resolution of the General Assembly of Ohio, submitting to the electors of the

> state a proposed amendment to the Constitution, that the same shall not go into effect until a time later than that fixed by Section 1 of Article XVI of the Constitution, is inoperative and void, unless the proposition to postpone the taking effect of such proposed amendment beyond the time named in the Constitution is also submitted to the electors of the state and adopted by a majority of those voting on the proposition."

The proposal to amend Section 2 of Article IV, *supra,* was submitted in the same proposed constitutional amendment as the proposal to enact Section 6 of Article IV.

I can determine no difference in the method of submitting the amendment of Section 2 of Article IV and the enactment of Section 6 of Article IV to the electors. Consequently, I am constrained to conclude that Section 6(C) of Article IV became effective upon its passage on May 7, 1968.

Section (E) of the "Schedule" of Amended Substitute House Joint Resolution No. 42 provides:

> "(E) Any judge who is holding office on December 31, 1969, and who would be eligible for re-election in 1970 for a term beginning in 1971 except for his age and the provisions of division (C) of Section 6, Article IV, shall be eligible nevertheless to be re-elected in 1970 for one additional term as judge of the same court".

This language was included in the text of the amendment published as required by Section 1 of Article XVI of the Ohio Constitution "once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published."

Although Section 1 of Article XVI as interpreted in *State, ex rel. McNamara* v. *Campbell, supra,* required the Court to conclude in *Euclid* v. *Heaton, supra,* that the establishment of an effective date at a date later than that fixed

by Section 1 of Article XVI, was "inoperative and void, unless the proposition to postpone the taking effect • • • is also submitted to the electors of the state and adopted by a majority of those voting on the proposition," I find nothing in the laws or Constitution of Ohio nor in the *McNamara* case, *supra*, which would require that all language of a proposed amendment appear on the ballot that is submitted to the electors, in order to be operative and valid. To the contrary, Section 3505.06, Revised Code, provides, in part:

> "The questions and issues ballot need not contain the full text of the proposal to be voted upon. A condensed text that will properly describe the question, issue, or amendment shall be used as prepared and certified by the secretary of state for state-wide questions or issues or by the board for local questions or issues. If such condensed text is used, the full text of the proposed question, issue, or amendment together with the percentage of affirmative votes necessary for passage as required by law shall be posted in each polling place in some spot that is easily accessible to the voters."

Pursuant to the foregoing authority, the Secretary of State condensed the text of Amended Substitute House Joint Resolution No. 42. The pertinent language of the condensed text of the ballot submitted to the electors was:

> "• • • to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years • • •"

Pursuant to the requirement of Section 3505.06, *supra*, the full text of the proposed amendment was posted in each polling place. This requirement of Section 3505.06, *supra*, and the requirement that the full text be published for five consecutive weeks, was considered by the Ohio Supreme Court in *State, ex rel. Foreman* v. *Brown*, 10 Ohio St. (2d),

139 (1967). In the Court's opinion by Mr. Chief Justice Taft, there is quoted at page 149 from an earlier case the following language:

> "'* * * the possibility of misunderstanding seems remote especially when it is remembered that the full text of the amendment was published in at least one newspaper in each county once a week for five consecutive weeks preceding the election, and that the full text was duly posted in every polling place. Of course a greater degree of accuracy of expression would have resulted if the ballot had contained the lengthy involved technical terms of the entire amendment, but this is the very difficulty sought to be avoided by the statute which expressly states that the "ballot need not contain the full text of the proposal" and that a "condensed text" may be substituted therefor. * * *'"

The foregoing language is equally applicable to the condensation of Amended Substitute House Joint Resolution No. 42 prepared by the Secretary of State.

Recognizing that the full text of the amendment proposed by Amended Substitute House Joint Resolution No. 42, including the Schedule, was published for five consecutive weeks preceding the election, as required by the Constitution and the full text was posted at each polling place as required by Section 3505.06, *supra*, I conclude that the condensation "properly described" and included the "Schedule" and that the "Schedule" became effective immediately upon passage.

Accordingly, an anomalous situation exists: A constitutional provision is effective, which specifically makes ineligible for re-election at the election in November, 1968, a judge currently holding office who will have attained the age of seventy years by the time he will assume office for such term, while exempting from its provisions judges who are holding office on December 31, 1969, and who would be other-

wise eligible for re-election in 1970 for a term beginning in 1971, by permitting such judges to be re-elected for one additional term. I recognize that the reason for this anomoly was the intention of the General Assembly that the constitutional amendment proposed by Amended Substitute House Joint Resolution No. 42 was not to be effective until January 10, 1970, and the necessarily incidental intention that it was not to apply to judges running for re-election in 1968.

You do not ask about the eligibility of a candidate for election to judicial office at the election in November, 1968, who will attain the age of seventy years who is not running for re-election either because he was appointed to the judicial office or because he is not an incumbent and, therefore, I express no opinion on the validity of such candidacy.

The "Equal Protection" clause, Section 1 of Article XIV of the United States Constitution provides, in part, that:

> "• • • nor shall any State • • • deny to any person within its jurisdiction the equal protection of the laws."

The United States Supreme Court has interpreted this requirement to guarantee that "all persons shall be treated alike under like circumstances and conditions." *Yick Wo* v. *Hopkins*, 118 U.S., 356. The Equal Protection clause prohibits the Ohio Constitution from disqualifying some judges from running for re-election who have attained the age of seventy years while permitting other of the same age to run for re-election without some reasonable basis for making the distinction.

There is nothing inherent in holding judicial office on December 31, 1969, which would reasonably justify allowing such judge who would be seventy before he assumed office to run for re-election for one additional term while denying to a judge who holds judicial office after May 4, 1968, but before December 31, 1969, the same right to run for re-

election if he would be seventy before he assumed office for the term to which he was re-elected.

Consquently, either Division (E) of the Schedule is invalid because it is an unreasonable preference of some judges or Section 6(C) of Article IV is invalid because it works an unreasonable disqualification of similarly situated judges. It is clear that the people of Ohio could provide in the Ohio Constitution that no one who has attained the age of seventy year is eligible to run for judicial office. It is equally clear that there is no requirement that the Ohio Constitution have any limitation as to age of judicial candidates for re-election.

Given this choice of inherently permissible alternatives, I must be guided by the intention of the General Assembly of Ohio in proposing to the electors of Ohio, Amended Substitute House Joint Resolution No. 42 and the intention of the majority of the electors of Ohio in adopting it. It is clear from a reading of the exception contained in Division (E) of the "Schedule," *supra,* and the effective date of January 10, 1970, of the Resolution that the General Assembly intended that any persons holding judicial office who attained the age of seventy years on or before December 31, 1969, would be eligible for re-election to one term. In consideration of the fact that the full text was published once a week for five consecutive weeks prior to the election and a copy of the full text was posted at each polling place I conclude that those electors voting for the proposal intended that the incumbent judges on or before December 31, 1969, would be eligible for re-election.

The "Effective Date and Repeal" division of Amended Substitute House Joint Resolution No. 42 provides, in part:

> "If adopted by a majority of the electors voting on this amendment, the amendment except paragraph (B) of the Schedule shall take effect January 10, 1970. * * *"

Inasmuch as it is not constitutionally permissible to conclude that a judge who holds judicial office on or after May 4, 1968, but prior to December 31, 1969, may not run for re-election if he would attain the age of seventy years before he would assume office for the term to which he was re-elected while concluding that a judge who holds office on December 31, 1969, is eligible to run for re-election even though he would attain the age of seventy years before assuming office, I do conclude that the disqualification of judges running for re-election contained in Section 6(C) of Article IV is not effective until January 1, 1970.

Accordingly, it is my opinion and you are advised that a judge who is currently holding office and who otherwise would be eligible for re-election is not disqualified from running for re-election in November, 1968 for the reason that he will have attained the age of seventy years by the time he would assume the office for the term to which he was re-elected.

APPENDIX C

OFFICIAL
QUESTIONS AND ISSUES BALLOT
VOTE BALLOT WITH AN "X"

* * * * * * * * *

PROPOSED CONSTITUTIONAL AMENDMENT

3.

ADMINISTRATION AND ORGANIZATION OF OHIO JUDICIAL SYSTEM

(Proposed by Resolution of the General Assembly of Ohio)
A majority affirmative vote is necessary for passage.

YES	SHALL THE CONSTITUTION OF THE STATE OF OHIO BE AMENDED BY AMENDING SECTIONS 1 and 2, ENACTING SECTIONS 3, 4, 5 AND 6 AND REPEALING EXISTING SECTIONS 3, 4, 6, 7, 8, 10, 12 AND 14 OF ARTICLE IV AND BY REPEALING SECTIONS 12 AND 13 OF ARTICLE 11 AS ADOPTED IN 1851 TO PROVIDE THAT THE SUPREME COURT SHALL DECIDE ALL CASES BY MAJORITY VOTE, TO FIX THE POWER OF THE SUPREME COURT OF OHIO TO EXERCISE ADMINISTRATIVE SUPERVISION OVER ALL COURTS AND TO MAKE RULES OF PRACTICE AND PROCEDURE, TO PROHIBIT THE ELECTION OR APPOINTMENT TO ANY JUDICIAL OFFICE OF A PERSON WHO SHALL HAVE PASSED THE AGE OF 70 YEARS, TO EQUALIZE JUDGES' SALARIES AND TO ALLOW INCREASES IN COMPENSATION DURING TERM, TO REMOVE THE PROBATE COURT AS A CONSTITUTIONAL COURT AND TO AUTHORIZE THE CONSOLIDATION OF COUNTY PROBATE COURTS AND COURTS OF COMMON PLEAS?
NO	

United States of America
State of Ohio ss.
Office of the Secretary of State

I, TED W. BROWN, Secretary of State of the State of Ohio, do hereby certify that the ballot as above shown is the prescribed form for the Special Election to be held May 7, 1968.

Witness my hand and official seal at Columbus, this 8th day of March, 1968.

TED W. BROWN

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In the Supreme Court of the United States

October Term, 1969

No. 654

CLAY E. HUNTER, *Petitioner*

v.

STATE OF OHIO, *ex rel.* ROY E. MILLER, THE STARK COUNTY BOARD OF ELECTIONS, TED W. BROWN, SECRETARY OF STATE, *Respondents*

ON PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT ROY E. MILLER IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of Ohio is unreported.[1] It is printed as Appendix B to the petition for certiorari, page 10a.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on June 18, 1969. On September 17, 1969, Mr. Justice Stewart extended the time to file the petition of certiorari until October 16, 1969. The petition for writ of certiorari was filed on September 25, 1969. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

---

1. The citation given by petitioner to 18 Ohio St. 2d 66 (1969) refers to *State ex rel. Stillo v. Gwin*, an unrelated decision.

Questions Presented

May a petition for certiorari be taken from the decision of a state court on an issue not raised or decided below by an individual who is not a party, who made no effort to intervene below until after the judgment of the state supreme court, and who was then denied leave to intervene by the state supreme court?

Did the Ohio Supreme Court deny due process by holding under the Ohio Constitution that the Ohio Constitution may be amended only by those propositions actually placed before the voters on the ballot?

Constitutional Provisions and Statutes Involved

This case involves Article IV and Article XVI, Section 1 of the Ohio Constitution, and Amendment 14, Section 1, United States Constitution. These are reprinted at Appendix A of the petition.

Statement of the Case

On May 7, 1968, the following question was put before the voters of Ohio and answered affirmatively by them:

> "Shall the Constitution of the State of Ohio be amended . . . to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years . . . ?"[2]

An earlier resolution of the state legislature would have made this clause inapplicable until 1970, and even then inapplicable to the first re-election of a sitting judge, but those exceptions were in no way reflected in the proposition submitted to the voters by the Secretary of State under the direction of the legislature.

---

2. The full text of the question, which covered other matters not here relevant, is set forth at pages 5-6 of the petition for certiorari.

On January 22, 1969, petitioner (now 74 years of age) filed with the Board of Elections of Stark County, Ohio, nominating petitions for the position of judge of the Municipal Court of Canton, Ohio. Despite the absence of other candidates in the primary, petitioner was not issued a certificate of nomination for the general election to be held in November, 1969.

Respondent Roy E. Miller, a voter and taxpayer, filed an original action in the Supreme Court of Ohio on May 15, 1969, seeking a writ of prohibition to prevent the Stark County Board of Elections from placing petitioner's name on the ballot, and also to prevent the Democratic party from naming a substitute for him. On June 18, 1969 the Supreme Court of Ohio granted the writ of prohibition as to the first issue but declined to reach the second.

Petitioner moved for the first time to intervene in the Ohio Supreme Court after judgment, on the ground that this would permit him to petition for certiorari to this Court. The application to intervene was denied, as was petitioner's application for reconsideration of the denial.

Reasons for Denying Intervention and the Writ of Certiorari

A. There Is No Jurisdiction to Consider Petitioner's Claims: Petitioner Was Neither a Party Below nor Did Anyone Raise There the Issues He Seeks to Present.

1. *The issue was never raised or decided below.*

At pages 7 through 9, petitioner quotes from the brief of the Stark County Board of Elections in an attempt to show that his constitutional issues were raised there, and thus meet this Court's jurisdictional requirements. E.g., *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). This quotation, which is taken out of context, relates to an issue which the court below did not decide, and which is

quite distinct from the issues petitioner seeks to raise here. The most cursory examination of the papers below will establish that fact. It is hard to see how it can have escaped petitioner's attention.

The petition for a writ of prohibition prayed at page 4 for two different kinds of relief: prohibition against submission of Judge Hunter's name on the ballot, and prohibition against substituting the name of another Democrat for his. The first section of the respondent's brief was captioned "The Board of Elections Should Not Be Prohibited From Issuing a Certificate of Nomination to the Honorable Judge Clay E. Hunter." In this section of the brief, respondents below argued only state law. The second section of the brief, assuming that Judge Hunter would not be issued a certificate of nomination or allowed on the ballot, argued that the Democratic party should be permitted to select a substitute candidate for him. This argument was based on an interpretation of Ohio Revised Code §3513.31 which concerns only substitutions, and is entirely irrelevant to the question whether Judge Hunter himself is entitled to be on the ballot. It was in connection with this right of substitution alone that the constitutional issues quoted by petitioner were raised.[3]

3. This issue raised but not decided below would be an entirely improper one for Judge Hunter to raise here. Judge Hunter has no standing to assert the power of the Democratic party to designate a substitute for him, when neither the Democratic party nor any potential substitute has raised such an issue here, nor was it decided below. Indeed, this substitution question is currently the subject of litigation in the Ohio Supreme Court on the facts of this very case; State of Ohio ex rel. Flex v. Gwin Case No. 69-666, filed October 6, 1969. At all events, if an error was made in the course of the May 6 primary, or in refusal to decide the question of the power of the Democratic party to designate a substitute candidate for Judge Hunter, those errors could not be rectified by placing Judge Hunter on the ballot, which is the relief he asks.

The Supreme Court of Ohio did not explicitly decide any constitutional issue, nor did it need to decide implicitly the constitutional issue presented below—an issue quite distinct from that raised here—since the court did not decide the question of substitution in which that constitutional issue was raised. The Ohio Supreme Court merely prohibited placing Judge Hunter's name on the ballot and concluded: "Consideration of the further relief prayed for [the substitution issue] is premature."

2. *Petitioner was properly denied intervention.*

Petitioner's constitutional rights were not adjudicated below for the simple reason that he did not see fit to become a party below. He does not contend that he was unaware of the litigation, but instead asserts that he "relied upon the named respondents to represent his interests." (petn 10).[4] The refusal of the Ohio Supreme Court to permit petitioner's belated entry into the case is based upon an independent and adequate state ground which is not one for this Court's review. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

(a) Petitioner artfully styles his brief as a "petition for leave to intervene." However, there is no case in this Court into which petitioner could intervene; none of the parties has taken the Ohio case, *Ohio ex rel. Miller v. Gwin*, to this Court. Even petitioner designates this case quite differently; *Hunter v. Ohio ex rel. Miller*. The "petition for leave to intervene" must be denied.

(b) Petitioner's brief is really, as he recognizes, essentially a petition for "review of the denial of the application

---

4. This Court may wish to take judicial notice of the official correspondence of the Stark County Board of Elections, reproduced at Appendix A, p. 12 infra, which establishes that petitioner was well aware of the pendency of the litigation from the outset.

to intervene," (petn 11) and a petition for certiorari on the merits.

However, there is no basis for taking the first step of overruling the Ohio Supreme Court's decision that petitioner had no right to intervene in the case after judgment. The Ohio Supreme Court granted a motion by a judicial candidate to intervene in a case on all fours with this one except that the motion to intervene was presented before judgment. That case, *State ex rel. Graves v. Brown*, 18 Ohio St. 2d 61 (1969) was cited below as authority for this one and is printed at petition 11a. Had petitioner here moved to intervene before judgment in the Ohio Supreme Court the motion would surely have been granted. At all events, it was no abuse of discretion for the Ohio court to deny intervention after judgment, nor is the exercise of discretion by the Ohio court a proper subject of review here.

On what basis should this Court overrule the decision of the Ohio Supreme Court that by his delay petitioner has lost his right to enter this case? This decision was not based on federal law and constitutes an entirely independent state ground. The adequacy of this independent state ground is no more open to question than the adequacy of any state timeliness requirement, *Edelman v. California*, 344 U.S. 357 (1953). Moreover, unlike most timeliness decisions, the denial of the motion to intervene did not deprive petitioner here of all possibility of relief. If he was not a party to the case below, he was not bound by the judgment in it, and was free to bring an action himself in the Ohio Supreme Court or elsewhere to assert his alleged right to be on the ballot. The judgment in the case below would not be res judicata against him. The fact that petitioner mistook his remedy and attempted an untimely intervention in this case, rather than intervening

earlier, or later bringing an independent action, does not entitle him to relief in this Court.[5]

Petitioner's extensive citation of cases in the federal courts avails him not at all. All of these involve either intervention in the appellate court by a new individual after a party had already brought the case to the appellate

---

5. Any responsibility for delay must be laid to petitioner, who had more than a year's notice that this problem would arise should he seek re-election. Petitioner officially declared himself a candidate for re-election on December 30, 1968. The Ohio Supreme Court held on June 19, 1968, in *Euclid v. Heaton*, 15 Ohio St. 2d 65, 238 N.E.2d 790 that the clause of the state legislative resolution which would have prevented the age limit on the judiciary from going into effect until 1970 was ineffective since it was not reflected on the ballot summary placed before the voters. In view of this decision, following *State ex rel. McNamara v. Campbell*, 94 Ohio St. 403, 115 N.E. 29 (1916), the clause permitting re-election of a sitting judge was likewise doomed to failure, as the court later held in *Graves*. However, the state attorney general concluded that the clause permitting re-election of sitting judges should instead be applied to 1969 and as well to 1970 in order to prevent any "anomaly" between 1969 and 1970 elections, assuming that the re-election clause was applicable in 1969 despite the absence of any language reflecting the clause on the ballot. Opinion No. 68-110, 1968 Op. Atty. Gen. Ohio 110, printed at petn 13a. The Ohio Supreme Court's rejection of this position in the *Graves* case was almost inevitable in view of its prior decisions in the *Euclid* and *McNamara* cases. In any event the existence of an issue applicable to petitioner's re-election must have become apparent immediately upon the decision of the *Euclid* case, and was underscored by the opinion of the state attorney general. If petitioner wished to avoid a rush to judgment before election, petitioner should have brought a declaratory action to determine his rights long ago, and surely should have acted before the judgment of the Ohio Supreme Court in this case, which was predictably based on the square holding of the *Graves* case.

court, *N.L.R.B. v. Acme Industrial Co.*, 384 U.S. 925 (1966); *Eastern-Central Motor Carriers Assoc. v. United States*, 321 U.S. 194, 198 n. 5 (1944); *McKenna v. Pan American Petroleum Corp.*, 303 F.2d 778, 779 (C.A. 5 1962) (intervention denied), vacated on other grounds, 384 U.S. 63 (1966); *United States v. Northern Securities Co.*, 128 F. 808 (C.C.S.D. Minn.), aff'd on other grounds, 193 U.S. 197 (1904) (intervention denied); or review by an appellate court of a lower federal court's decision to deny intervention, *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459 (1968) (party who had initiated original litigation below vindicating rights under a federal statute in federal court); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) (interpretation of F. R. Civ. P. 24); *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 506 (1941); *Wolpe v. Poretsky*, 144 F.2d 505 (C.A. D.C.) (interpretation of F.R. Civ. P. 24), cert. denied, 323 U.S. 777 (1944). The latter determination is quite different from what the Court is asked to do here. This Court has a supervisory jurisdiction over the procedures and the exercise of discretion of federal courts which it has never exercised over state courts.

The question here is not whether petitioner has an interest in the case, or whether petitioner has standing to assert a claim on the merits in some forum, or whether petitioner could have intervened had this action been brought in the federal courts. Rather, the first question is whether petitioner can raise here a constitutional question no one raised below. The second is whether the Ohio Supreme Court was wrong in refusing to allow petitioner to intervene after judgment. As a matter of Ohio law, to which no federal objection was made, the decision below is correct on both points. Petitioner's attempt, as a new party, to seek certiorari on a new issue is clearly improper.

B. THE SUPREME COURT OF OHIO DID NOT DENY DUE PROCESS BY DECIDING THAT THE OHIO CONSTITUTION IS AMENDED ONLY BY THOSE PROPOSITIONS ACTUALLY PLACED BEFORE THE VOTERS ON THE BALLOT.

The correctness of the Ohio Supreme Court in its interpretation of the Ohio Constitution is obviously not a matter for this Court. Petitioner's argument to the contrary is simply that the people set up a governmental structure which the Ohio Supreme Court misinterpreted, and that this mistake in interpreting the people's will on this fundamental matter denies them due process. To accept this view would be to hold that any state court interpretation of a state constitution is open to review on the merits in this Court.

The ruling of the Ohio Supreme Court is an entirely foreseeable and reasonable interpretation of the state constitution. The Ohio Constitution, Article XVI, Section 1, provides that "If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution." As early as 1916, in *State ex rel. McNamara v. Campbell*, 94 Ohio St. 403, 115 N.E. 29, the Ohio Supreme Court held that a clause of a legislative resolution stating the date of effectiveness of a proposed amendment was invalid, since it was not explicitly submitted to the voters, even though the proposed amendment itself was submitted to them. This case, a reasonable interpretation of the constitutional language, was authority for *Euclid v. Heaton*, 15 Ohio St. 2d 65, 238 N.E.2d 790 (1968), which characterized the proposition that any constitutional amendment must be explicitly submitted to the voters as "settled law in this state," and applied it just as in *McNamara* to render invalid the prospectivity clause in the amendment at issue here. In light of *McNamara*, and of *Euclid*, the holding of *Graves*—

that the clause permitting one re-election of a sitting judge was invalid since it was not explicitly submitted to the voters—followed as the night the day.

The Ohio Supreme Court precisely effected the will expressed by the electorate. The people only voted on what was placed before them; petitioner would turn this vote into a blanket endorsement of everything which at one time or another might have been in the minds of the Ohio legislature. It is the petitioner's doctrine which is by far the more dangerous and which would "overrule the voters' desires regarding the manner by which they select their judges." The people are entitled to know upon what they are voting, and the Ohio Supreme Court furthered that right by holding that only those provisions reflected on the ballot become state constitutional law. Otherwise, subtle omissions in the summary might lead the people unwittingly to endorse propositions which could never receive their direct approval.

If the Ohio constitution is to be amended, this should be done by setting out the amendments with succinct precision for the voters' scrutiny, rather than forcing them to rely on often garbled television news or campaign accounts. The Ohio court may permissibly interpret the state constitution to mean that presence of a precise summary on the ballot is better calculated to capture timely voter attention than random publicity, posting of the original somewhere near the polling place, or newspaper notice. Petitioner argues that this means the Ohio Secretary of State has power by his formulation of the summary effectively to propose constitutional amendments himself. First, this assumes an incompetence or bad faith on the part of the Secretary of State which should not be presumed and certainly has not been proved here by any evidence, let alone the "clear evidence" required, *United*

States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926). Second, the Ohio legislature can direct the Secretary of State exactly what to put on the ballot, so that he need be left no discretion whatever.

Conclusion

There is no jurisdiction, since the federal constitutional issue was not raised below, and also since petitioner was properly denied intervention below upon an independent and adequate state ground. Moreover, the decision of the Supreme Court of Ohio upon the merits of this matter of state law reinforces the fundamental political right of a free people to vote, by assuring that they are fully aware of that whereon they are voting.

Respectfully submitted,

HENRY A. BERLINER, JR.
1100 Connecticut Avenue
Washington, D.C. 20036

Attorney for Respondent
Roy E. Miller

HARRY SCHMUCK
First National Bank Building
Canton, Ohio 44702

Of Counsel
October 15, 1969

May 27, 1969

HON. CLAY E. HUNTER,
Judge of Canton
Municipal Court
City Hall,
Canton, Ohio

In re: Miller vs Stark County Board of Elections – Case No. 69-321 Supreme Court of Ohio

Dear Judge Hunter:

The Stark County Board of Elections, by a motion adopted at a meeting held Monday, May 26, 1969, has instructed me to address the following request to you.

Whereas, the Petition in the case referred to above alleges that you are over 70 years of age, and

Whereas, the Stark County Board of Elections must make a determination as to your age,

Now therefore, The Stark County Board of Elections respectfully requests you to please advise said Board as to your date of birth.

Very truly yours,

JOHN J. WALDECK, *Director*
Stark County Board
of Elections

J J W:mn

MUNICIPAL COURT, CANTON, OHIO

May 29, 1969

Mr. John J. Waldeck, Director
Stark County Board of Elections
Court House Annex
Canton, Ohio 44702

Greetings:

In reply to your inquiry of May 27, 1969, I was born on January 14th, 1895, apparently thirty years too soon.

Yours very truly,

C. E. HUNTER, *Judge*

CEH/mes

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FILED
OCT 15 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 654

CLAY E. HUNTER, *Petitioner*

v.

STATE OF OHIO, EX REL, ROY E. MILLER; THE STARK COUNTY BOARD OF ELECTIONS, TED W. BROWN, SECRETARY OF STATE, *Respondents*

REPLY BRIEF OF THE RESPONDENT STARK COUNTY BOARD OF ELECTIONS TO THE PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

DAVID D. DOWD, JR.
Prosecuting Attorney of
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Stark County Board of Elections

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 654

CLAY E. HUNTER, *Petitioner*

v.

STATE OF OHIO, EX REL, ROY E. MILLER, THE STARK COUNTY BOARD OF ELECTIONS, TED W. BROWN, SECRETARY OF STATE, *Respondents*

REPLY BRIEF OF THE RESPONDENT STARK COUNTY BOARD OF ELECTIONS TO THE PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

STATEMENT OF THE CASE

The Respondent, the Stark County Board of Elections, is charged with the responsibility of conducting the election for the office of Judge of the Canton Municipal Court for the new term commencing January 2, 1970.

In Ohio the chief election officer is the Secretary of State, *Section 3501.04, Revised Code of the State of Ohio.* (Appendix A-1) The County Board Elections is an appointed body of four members. Two from each of the two major political parties are appointed by the Secretary of State, *Section 3501.06, Revised Code of the State of Ohio,* (Appendix A-1) after receiving a recommendation from the political party organization. *Section 3501.07, Revised Code of the State of Ohio.* (Appendix A-1)

The county prosecuting attorney is the legal adviser of the Board of Elections and in that capacity submits this brief.

Candidates for the office of Judge of the Canton Municipal Court appear on a non-partisan ballot in the general election conducted in November. The candidates secure their position on the non-partisan ballot at the general election in November by either filing as an independent candidate pursuant to *Section 1901.07 of the Revised Code of Ohio,* (Appendix A-2) or by winning nomination at the party primary be it the Republican Party or the Democratic Party in the May primary and again pursuant to the provisions of *Section 1901.07 of the Revised Code of Ohio.*

In the election process conducted to date for the office of Judge of the Canton Municipal Court for the term beginning January 2, 1970, no independent candidate petitions were filed, but three party nominating petitions were filed. Two were filed for the Republican nomination and a Republican primary election was held on the 6th day of May. Harold DeHoff was declared the winner and issued a certificate of nomination as the Republican candidate, and his name

will appear on the non-partisan ballot at the November 4, 1969, general election.

The petitioner filed a nominating petition on January 22, 1969, seeking nomination as the Democratic Candidate for the Office of Judge of the Canton Municipal Court. (Appendix A-6) As no other person filed nominating petitions for nomination as the Democratic Party nominee other than the petitioner, and as the petitioner was the only candidate qualifying for nomination in the Democratic primary for office of Judge of the Canton Municipal Court, no ballot for that office was submitted to the Democratic Party voters at the May primary pursuant to the provisions of *Section 1901.07 and 3513.02 of the Ohio Revised Code.* (Appendix A-2 and Appendix A-3)

Although the petitioner was entitled to a certificate of nomination after 4:00 p.m. on the ninetieth day before the primary election of 1969 pursuant to the provisions of *Sections 1901.07 and 3513.02 of the Revised Code of Ohio,* no certificate of nomination was issued the petitioner prior to the primary election.

On April 30, 1969, some six days before the May primary the Supreme Court of Ohio announced its decision in *State ex rel Graves* vs. *Brown,* 18 O.S. 2d 51, 1969 (Appendix B-2, page 11-A of petitioner's brief) in which Judge Zona, a candidate for re-election to the Parma Municipal Court, and then 70 was denied a place on the May primary ballot for the reason that he was no longer qualified to hold the office due to his age and application of Section 6(C) of Article IV of the Ohio Constitution as amended May 7, 1968. (Appendix A-2, page 1-a of petitioner's brief)

Following the May, 1969, primary and before the Respondent Board of Elections decided whether to

issue a certificate of nomination to the petitioner, an original action in prohibition was filed in the Supreme Court Ohio by the Respondent Roy Miller (*State ex rel Miller* vs. *Gwin,* 18 O.S. 2d 66 (1969)) praying for the following orders:

> "(1) That a Writ of Prohibition issue against the Respondents, Ted W. Brown and the members of the Board of Elections of Stark County, Ohio, from issuing a certificate of nomination for the office of Judge of the Canton Municipal Court to Judge Clay E. Hunter.
>
> "(2) That the Respondents, members of the Board of Elections, Stark County, Ohio, be prohibited from placing the name of Judge Clay E. Hunter on the ballot as a candidate for Judge of the Municipal Court of Canton, Ohio, in the November, 1969, general election.
>
> "(3) That the Respondents Stark County Board of Elections and Ted W. Brown be prohibited from substituting on the ballot for the November, 1969, general election, a Democratic candidate for election as Judge of the Canton Municipal Court where no eligible candidate was nominated for said office.
>
> "(4) That the Respondents Stark County Board of Elections and Ted W. Brown be prohibited from submitting to the voters within the jurisdiction of the Canton Municipal Court a ballot containing the name of Clay E. Hunter or any other name substituted therefor by the Respondents the Stark County Board of Elections.
>
> "(5) For such other orders and relief as may be proper in the premises."

In that action this Respondent was also a Respondent and filed a demurrer together with an agreed statement of facts. (Appendix A-8) Specifically, the

Respondent Stark County Board of Elections contended as follows:

> "(1) The Board of Elections should not be prohibited from issuing a Certificate of Nomination to the Honorable Judge Clay E. Hunter.
>
> "(2) In the event it is the decision of the Supreme Court of Ohio that a Certificate of Nomination should not be issued to the Honorable Judge Clay E. Hunter, then the Democratic Party pursuant to the provisions of *R.C. 3513.31* should be permitted to select a Candidate as a substitute for the Honorable Judge Clay E. Hunter for the office of Judge of the Canton Municipal Court at the general election of November, 1969."

In taking and briefing this position in the Supreme Court of Ohio the Respondent Board of Elections attempted to provide the Supreme Court of Ohio with arguments contrary to those being advanced by the petitioner Roy E. Miller in view of the fact that the petitioner Clay E. Hunter was not joined nor did he intervene, nor was any adversary position presented by any other party.

On the issue of whether the Democratic Party through its central committeemen in the geographical area comprising the Canton Municipal Court could substitute a candidate for the petitioner Clay E. Hunter, the Supreme Court of Ohio ruled that the relief sought by Roy Miller to deny this right to the Democratic Party was "premature". (Appendix B-1, page 10a of petitioner's brief.)

Subsequent to the June 18, 1969, opinion by the Ohio Supreme Court in *Miller* vs. *Gwin,* ibid., the Respondent Stark County Board of Elections met on July 1, 1969, and a motion to issue a certificate of nomi-

nation to the petitioner Clay E. Hunter resulted in a vote of two "yes" and two "no".

On July 7, 1969, the Respondent Ted W. Brown, Secretary of State, acting pursuant to the powers vested in him by *Section 3501.11 of the Ohio Revised Code* (Appendix A-4) broke the tie vote on the issue of whether to issue a certificate of nomination to the petitioner Clay Hunter by voting "no". (Appendix A-19)

On August 15, 1969, the Stark County Board of Elections received written notice (Appendix A-22) from the Stark County Democratic Central Committee to the effect that Anthony Flex had been unanimously selected by the committeemen of the said Stark County Democratic Central Committee as a candidate for the Canton Municipal Court Judge in the said Canton Municipal Court District to fill the vacancy "created by the Supreme Court of Ohio decision removing the name of Clay Hunter from the race", together with a signed statement from the said Anthony Flex accepting and consenting to be a candidate for said office, all of which was done in attempted compliance with the provisions of *Section 3513.31 of the Revised Code of Ohio* (Appendix A-5) and obviously in keeping with the argument made by the respondent Board of Elections in the case of *Miller* vs. *Gwin,* ibid. (Appendix A-8)

August 19, 1969, the Respondent Stark County Board of Elections met and received the communication from the Democratic Committee Organization of the Canton Municipal Court subdivision of the Stark County Democratic Central Committee. A motion was made to place the name of Anthony Flex on the ballot

as the Democratic party candidate in the election for judge of the Canton Municipal Court for the term beginning January 2, 1970. The vote on the motion was again two "yes" and two "no".

The Respondent Ted W. Brown, the Secretary of State of Ohio in interpreting *Section 3513.31 of the Revised Code of Ohio* (Appendix A-5), ruled that no "vacancy" permitting replacement existed and broke the tie vote by voting "no" on the motion to place the name of Anthony Flex as the Democratic Party candidate on the non-partisan ballot for the November election for the office of Judge of the Canton Municipal Court. (Appendix A-24)

In a meeting of the Respondent Stark County Board of Elections held on September 2, 1969, the August 22nd ruling of Respondent Secretary of State Ted W. Brown was acknowledged and thereafter action was taken by the Stark County Board of Elections to order the limited number of five hundred (500) ballots for the judicial race in issue.

Pursuant to the provisions of Ohio law these ballots are now being used for voting absent servicemen's ballots and absent civilian and disabled voters. A copy of the ballot ordered by the Board of Elections on September 2, 1969, and presently being voted, lists as a candidate for the term beginning January 2, 1970, only the name of Harold DeHoff and one space for write-ins. (Appendix A-26)

On October 7, 1969 Anthony Flex filed a Petition in Mandamus in the Ohio Supreme Court praying for an order placing his name on the ballot as the Democratic Party Nominee.

ARGUMENT

A. The Respondent, Stark County Board of Elections Does Not Oppose Intervention of the Petitioner But Does Urge a Prompt Disposition of the Issues Raised by the Petitioner So That the November 4, 1969, General Election Is Not Delayed

Counsel for the Respondent Board of Elections has been instructed to advise the Supreme Court of the United States that the Board of Elections as a board does not oppose the motion of the petitioner to intervene as a party. Further, the two members of the board holding office by virtue of the recommendation made by the political party organization which the petitioner seeks to represent as its candidate in the non-partisan judicial election, individually favor the motion of the petitioner to intervene.

However, in any event, the court is urged to make prompt and final disposition of this litigation so as to not delay the November 4, 1969, general election for the office at issue.

Time remaining prior to the November election obviously does not permit a lengthy consideration by the Court unless the Court were to order the election delayed. To do so would require a special one-purpose election as no election requiring polling places to be open is scheduled until the May, 1970, primary, long after the new January 2, 1970, term for Canton Municipal Court Judge commences.

The additional cost of such a special election requiring the polling places to be open not only within the City of Canton but throughout the district covered by the Canton Municipal Court including the sur-

rounding seven townships, is estimated by the Director of the Stark County Board of Elections to be approximately $33,908.00. (Appendix C-7, infra. pg.).

B. As the Issue of Whether To Grant the Petitioner the Relief Requested Is Being Subjected to Adversary Scrutiny by the Other Parties, the Respondent Stark County Board of Elections Waives Argument on That Issue

The Respondent Stark County Board of Elections exists for the purpose of conducting elections in a manner consistent with law. However, the manner of selecting the four members of the Stark County Board of Elections pursuant to *Section 3501.07* often results in the members of the Board individually adopting a position on election disputes regarding candidates that is politically oriented in terms of allegiance to the political party that recommended their appointment. Such is the case in this issue.

In view of the fact that both sides of the issue of whether to grant the petitioner relief are being presented to this Court, the Respondent Stark County Board of Elections respectfully waives argument on the issue of whether the petitioner Clay E. Hunter should be granted a writ of certiorari and the relief sought.

CONCLUSION

The primary purpose of Respondents' brief is to submit a STATEMENT OF THE CASE with all relevant information and statutory citations to aid the Court in its deliberations.

The chief concern of the Respondent Board of Elections is to avoid the possibility of a special election for the office in issue and the resulting additional expenditure.

Thus, the Respondent Board of Elections respectfully urges a prompt decision so it may proceed to conduct the election when scheduled and consistent with judicial directions.

Respectfully submitted,

DAVID D. DOWD, JR.

David D. Dowd, Jr.
Prosecuting Attorney of
Stark County, Ohio

Attorney for Respondent
Stark County Board of Elections

APPENDIX

APPENDIX A

Constitutional Provisions and Statutes

§ 3501.04 Chief election officer. (GC § 4785-6)

The secretary of state is the chief election officer of the state, with such powers and duties relating to the registration of voters and the conduct of elections as are prescribed in Title XXXV of the Revised Code. He shall perform these duties, in addition to other duties imposed upon him by law, without additional compensation.

§ 3501.06 Board of elections; vacancies. (GC § 4785-8)

There shall be in each county of the state a board of elections consisting of four qualified electors of the county, who shall be appointed by the secretary of state, as his representatives, to serve for the term of four years. On the first day of March in even-numbered years the secretary of state shall appoint two of such board members, one of whom shall be from the political party which cast the highest number of votes for the office of governor at the last preceding regular state election, and the other shall be from the political party which cast the next highest number of votes for the office of governor at such election. All vacancies filled for unexpired terms and all appointments to new terms shall be made from the political party to which the vacating or outgoing member belonged, unless there is a third political party which cast a greater number of votes in the state at the last preceding regular state election for the office of governor than did the party to which the retiring member belonged, in which event the vacancy shall be filled from such third party.

§ 3501.07 Party recommendations; appointment.

At a meeting held not more than sixty nor less than fifteen days before the expiration date of the term of office of a member of the board of elections, or within fifteen days

after a vacancy occurs in the board, the county executive committee of the party entitled to the appointment may make and file a recommendation with the secretary of state for the appointment of a qualified elector. The secretary of state shall appoint such elector, unless he has reason to believe that the elector would not be a competent member of such board. In such cases the secretary of state shall so state in writing to the chairman of such county executive committee, with the reasons therefor, and such committee may either recommend another elector or may apply for a writ of mandamus to the supreme court to compel the secretary of state to appoint the elector so recommended. In such action the burden of proof to show the qualifications of the person so recommended shall be on the committee making the recommendation. If no such recommendation is made, the secretary of state shall make the appointment.

"Sec. 1901.07 Term of office of judge; nomination and election.

". . . If there are no charter provisions applicable, candidates for party nomination to the office of municipal judge shall file a declaration of candidacy and petition not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May, in the form prescribed by Section 3513.07 of the Revised Code. The petition shall be signed by at least one hundred qualified electors of the territory of the municipal court who are members of the same political party of which the candidate is a member, or by such electors equal in number to at least five per cent of the number of the votes cast for the candidate for governor of the same political party in such territory at the next preceding regular state election if such five per cent is less than one hundred, and such declaration of candidacy and petition shall be filed with the board of elections of the county; provided that such board shall not accept or file any such petition appearing on its face to contain the signatures of more than five hundred electors. If no valid

declaration of candidacy is filed for nomination as a candidate of a political party for election to the office of municipal judge, or if the number of persons filing such declarations of candidacy for nominations as candidates of one political party for election to such office does not exceed the number of candidates which such political party is entitled to nominate as its candidates for election to such office, then no primary election shall be held for the purpose of nominating candidates of such party for election to the office, and such candidates shall be issued certificates of nomination in the manner set forth in section 3513.02 of the Revised Code. . . ."

"If there are no charter provisions applicable, the nominating petition of independent candidates for the office of municipal judge shall be filed not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May, in the form prescribed by section 3513.261 (3513.26.1) of the Revised Code. The petition shall be signed by qualified electors of the territory of the municipal court not less in number than one per cent of the number of electors who voted for governor at the next preceding regular state election in the territory over which such court has jurisdiction, or twenty-five hundred electors, whichever is the lesser number. No such nominating petition shall be accepted for filing or filed if it appears on its face to contain signatures aggregating in number more than twice the minimum aggregate number of signatures required by this section . . ."

"Sec. 3513.02 Certificates of nomination issued when no primary is held.

"If, in any odd-numbered year, no valid declaration of candidacy is filed for nomination as a candidate of a political party for election to any of the offices to be voted for at the general election to be held in such year, or if the number of persons filing such declarations of candidacy for

nominations as candidates of one political party for election to such offices does not exceed, as to any such office, the number of candidates which such political party is entitled to nominate as its candidates for election to such office, then no primary election shall be held for the purpose of nominating candidates of such party for election to offices to be voted for at such general election and no primary ballots shall be provided for such party. If, however, the only office for which there are more valid declarations of candidacy filed than the number to be nominated by a political party, is the office of councilman in a ward, a primary election shall be held for such party only in the ward or wards in which there is a contest, and only the names of the candidates for the office of councilman in such ward shall appear on the primary ballot of such political party.

"The election officials whose duty it would have been to provide for and conduct the holding of such primary election, declare the results thereof, and issue certificates of nomination to the persons entitled thereto if such primary election had been held shall declare each of such persons to be nominated as of the date of the ninetieth day before the primary election, issue appropriate certificates of nomination to each of them, and certify their names to the proper election officials, in order that their names may be printed on the official ballots provided for use in the next succeeding general election in the same manner as though such primary election had been held and such persons had been nominated at such election."

"Sec. 3501.11 Duties of board.

"Each board of elections shall exercise by a majority vote all powers granted to such board by Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall: . . . (K) Review, examine, and certify the sufficiency and validity of petitions and nomination papers; . . . In all cases of a tie vote or a disagreement in the board,

if no decision can be arrived at, the clerk shall submit the matter in controversy to the secretary of state, who shall summarily decide the question and his decision shall be final."

"Sec. 3513.31 Vacancy by withdrawal, death, or resignation of nominee; selection of candidate for unexpired term.

". . . If a person nominated in a primary election as a candidate for election at the next general election, whose candidacy is to be submitted to the electors of a district within a county, withdraws as such candidate prior to the eightieth day before the day of such general election, the vacancy in the party nomination so created may be filled by a district committee consisting of those members of the county central committee in such county of the political party which made such nomination at said primary election who represent the precincts or the wards and townships within such district, at a meeting called for such purpose. Such district committee meeting shall be called by the chairman of such county central committee who shall give each member of such district committee at least two days' notice of the time, place, and purpose of such meeting. If a majority of the members of such district committee are present at such district committee meeting, a majority of those present may select a person to fill the vacancy. The chairman and secretary of such district committee shall certify in writing and under oath to the board of such county, not later than the seventy-sixth day before the day of such general election, the name of the person selected to fill such vacancy. Such certification must be accompanied by the written acceptance of such nomination by the person whose name is certified.

". . . If a person nominated in a primary election as a candidate for election at the next general election dies prior to the tenth day before the day of such general election

the vacancy so created may be filled by the same committee in the same manner as provided in the first five paragraphs of this section for the filling of similar vacancies created by withdrawalls. . . ."

APPENDIX B

DECLARATION OF CANDIDACY

Party Primary Election
For Judge or Clerk of the Municipal Court

To be filed with the Board of Elections not later than 4 P.M. of the Nintieth day before the day of the Primary Election

Revised Code 1901.07, .31; 3515.05, .07, .08, .09, .10

NOTE—The Candidate must fill in, sign and swear to his declaration before petitions are circulated.

I, Clay E. Hunter, the undersigned, hereby declare that
(Name of Candidate)
my voting residence is in L Precinct of the 5th Ward
(Township) or
in the County of Stark, Ohio; that my postoffice address
(Ward and City or Village) (Street
is 206 Millview Pl SW of the City of Canton, Ohio; that
and Number, if any, or Rural Route and Number) (City, Village or Postoffice)
I am a qualified elector in the precinct in which my voting residence is located. I am a member of the Democratic Party. I hereby declare that I desire to be a candidate for nomination as a candidate of the Democratic Party for election to the office of Judge of Canton Municipal Court District for the full term commencing January 2,
(full term commencing . . .) or (unexpired term ending . . .)
1970 in the city of Canton, Stark County, at the Primary Election to be held on the 6th day of May, 1969, and I hereby request that my name be printed upon the official primary election ballot of the said Democratic Party as a candidate for such nomination as provided by law.

I further declare that, if elected to said office, I will qualify therefor, and that I will support and abide by the principles enunciated by the Democratic Party in its National and State Platforms, and that I have not voted as a member of a different political party at any primary election within the next preceding four calendar years.

Dated this 30 day of December, 1968.

/s/ CLAY E. HUNTER
(Signature of Candidate)

The State of Ohio, County of Stark, ss.

Clay E. Hunter, being duly sworn, deposes and says
(Name of Candidate)
that he is the candidate named in the above declarations of candidacy and that the statements and declarations therein contained are true as he verily believes.

/s/ CLAY E. HUNTER
(Signature of Candidate)

Subscribed and sworn to before me this 30 day of December, 1968.

/s/ JAMES SECCOMBE
(Signature of Officer Administering Oath)
Director
(Title of Officer)

No. 69—321

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, on the Relation of
ROY E. MILLER
1415 - 25th Street, N.W.
Canton, Ohio 44709,
Relator,

v.

JOHN F. GWIN
1420 Fernwood Drive
Alliance, Ohio 44601

JAMES SECCOMBE
1439 Fulton Road, N.W.
Canton, Ohio 44703

CARL F. WISE
1308 Buena Vista Street, N.E.
Canton, Ohio 44714

EARLE E. WISE
5152 Eshelman Avenue, N.E.
Louisville, Ohio 44641

Forming a body known as
The Stark County Board of Elections, and

TED W. BROWN
Secretary of State
State House, Columbus, Ohio,

Respondents.

Counsel for Respondents
The Board of Elections of
Stark County, Ohio:

DAVID D. DOWD, JR.
Stark County Courthouse Annex
Canton, Ohio 44702

Counsel for Respondent
Ted W. Brown:

PAUL W. BROWN
State House
Columbus, Ohio

Counsel for Relator:

HARRY W. SCHMUCK
Attorney at Law
701 First National Bank Bld.
Canton, Ohio 44702

Demurrer and Brief of Respondents John F. Gwin, James Seccombe, Carl F. Wise and Earle E. Wise, Forming the Body Known as the Stark County Board of Elections

Demurrer

Now Come the Respondents John F. Gwin, James Seccombe, Carl F. Wise and Earle E. Wise, forming the body known as the Stark County Board of Elections and demur to the petition of the Relator.

DAVID D. DOWD, JR.
David D. Dowd, Jr.
Stark County Prosecuting Attorney
Attorney for Board of Elections of
Stark County, Ohio

It is hereby agreed by the Respondents, John F. Gwin, James Seccombe, Carl F. Wise and Earle E. Wise that the ruling on the demurrer heretofore filed in this action shall be dispositive of this action in accordance with the provisions of Section 4 of Article VIII of the Rules of the Supreme Court of Ohio.

Brief of Respondents in Support of Demurrer

(1) The Board of Elections Should Not Be Prohibited From Issuing a Certificate of Nomination to the Honorable Judge Clay E. Hunter.

Number One in the prayer of Relator's petition states as follows:

> "1. That a Writ of Prohibition issue against the Respondents, Ted W. Brown and the members of the Board of Elections of Stark County, Ohio, from issuing a certificate of nomination for the office of Judge of the Canton Municipal Court to Judge Clay E. Hunter;"

As indicated in the agreed statement of facts the Honorable Judge Clay E. Hunter was the only Democratic candidate for the office of Municipal Judge for the term for which he was a candidate and as a consequence he was entitled to a certificate of nomination following 4:00 p.m. on the ninetieth day before the primary election of May, 1969, pursuant to the provisions of *R. C. 1901.07* and *R. C. 3513.02*. The failure to give the Honorable Judge Clay E. Hunter a certificate of nomination does not negate the fact that he was entitled to receive the certificate in February of 1969. The failure to issue the certificate was clearly a failure to perform a ministerial act.

The election laws of the State of Ohio are designed to provide an orderly process in the control and conduct of primary elections and general elections. An obvious goal is to provide the voter in the general election with a choice in the elections of public officials.

Specifically, *R. C. 3513.31* sets forth a detailed process by which a candidate for the general election can be replaced in the event of his *withdrawal* or *death*.

In the absence of a certificate of nomination, it is questionable whether the Honorable Judge Clay E. Hunter is

in a position to withdraw as a candidate. Certainly he was entitled to be granted his certificate of nomination back in February of 1969. Then following the ruling of the Supreme Court of Ohio in *State ex rel Graves* v. *Brown,* 18 Ohio State 2d 61 (April 30, 1969) Judge Clay E. Hunter would have been in a position to determine whether or not to withdraw as a candidate. However, at this time, in the absence of a certificate of nomination, it is a cloudy issue as to whether Judge Hunter is even in a position to withdraw so as to permit his party, the Democratic party, to replace him on the ballot under the provisions of *R. C. 3513.31.*

Therefore, it is submitted that an orderly process in compliance with the spirit of the election laws of Ohio is to permit the Stark County Board of Elections to issue a certificate of nomination to Judge Clay E. Hunter so that he is then in a position to decide whether or not to withdraw. Then in the event of his failure to withdraw, the Stark County Board of Elections is in a position pursuant to the provisions of *Section 3501.11* and consistent with *State ex rel Janasik* v. *Sarosy,* 12 Ohio State 2d 5 (1967) to take action to remove the Honorable Judge Clay E. Hunter as a candidate if he refuses to withdraw.

The question of whether or not a "removed" candidate can be replaced by the party to which he belongs is apparently an unsettled question in the State of Ohio. A method by which this question can be avoided is simply for the candidate to withdraw, thereby giving his party the opportunity to replace him. However, if he is given no certificate of nomination in the first place, then the question arises as to whether or not he can withdraw if he did not receive a certificate of nomination. Therefore, it is submitted that the Stark County Board of Elections should not be prohibited from issuing a certificate of nomination to the Honorable Clay E. Hunter.

(2) In the event it is the decision of the Supreme Court of Ohio that a Certificate of Nomination should not be

issued to the Honorable Judge Clay E. Hunter, then the Democratic Party pursuant to the provisions of *R. C. 3513.31* should be permitted to select a candidate as a substitute for the Honorable Judge Clay E. Hunter for the office of Judge of the Canton Municipal Court at the general election of November, 1969.

Recognizing the possibility that this Court will determine that the decision of *State ex rel Graves* v. *Brown, supra,* will require that the court prohibit the Board of Elections of Stark County from issuing a certificate of nomination to the Honorable Judge Clay E. Hunter, then the question that arises is whether under the circumstances as set forth in the Agreed Statement of Facts the Democratic party by its central committeemen shall be permitted to substitute a candidate for Judge Hunter on the ballot for the November, 1969, general election, pursuant to *R. C. 3513.31.*

It should be noted at the outset that the Democratic voters at the May, 1969, primary had no opportunity whatsoever to cast a ballot for a candidate as a representative of their party for the November, 1969, election. In view of the fact that Judge Hunter was the only candidate filing petitions pursuant to the law, no ballot was submitted to the electorate so they did not even have the opportunity to write in a candidate and vote for him. The Board of Elections in not providing ballots for the Democratic party voters was following the mandate of *R. C. 1901.07* and *R. C. 3513.02.* At the time the Board of Elections made the decision to consider Judge Hunter as the only candidate for the Democratic party for the nomination so as to eliminate the necessity of providing a ballot for the Democratic voters, the Stark County Board of Elections was operating in compliance with the Opinion No. 68-110 of the Attorney General of the State of Ohio issued July 5, 1968, and also in compliance with the directive of Secretary of State Ted W. Brown in his bulletin dated January 15, 1969, as set forth in the Agreed Statement of Facts.

The subsequent decision of this court in *Graves* v. *Brown, supra,* was not to come until the 30th of April, 1969.

In the event Judge Hunter is to be denied a certificate of nomination by reason of the authority of *Graves* v. *Brown, supra,* the Democratic party will be without a candidate in the November, 1969, General Election for the office of Canton Municipal Court Judge unless the Democratic party is permitted the opportunity pursuant to the spirit of the provisions of *R. C. 3513.31* to select a substitute candidate.

It is submitted that consistent with the spirit of the elections laws of the State of Ohio and the directives issued by the chief elections official of the State of Ohio, Mr. Ted W. Brown, Secretary of State, that the Honorable Judge Clay E. Hunter was a candidate in the sense of *R. C. 3513.31* and should be considered as a candidate for the purpose of the question of whether or not he can be replaced.

Although *R. C. 3513.31* is silent on the question of whether a "removed" candidate in contrast to a "withdrawing" candidate can be replaced by a substitute, it is submitted that the Honorable Judge Clay E. Hunter, if removed by the order of this Court, should be considered as a "withdrawing" candidate so as to permit the Democratic party in the jurisdiction of the Canton Municipal Court to choose and select a substitute for the November election, thereby granting to the voters in the jurisdiction of the Canton Municipal Court a choice which otherwise is to be denied them through no fault of their own.

It is submitted that a strict interpretation of the provisions of *R. C. 3513.31* in this unique factual situation would be in direct conflict with the "Right to Vote" as described and stressed by the Supreme Court of the United States in its October, 1968, decision permitting the Ohio American Independent Party's Presidential candidate George Wallace the right to be on the Ohio, 1968, Presi-

dential ballot despite the party's failure to comply with the Ohio election laws. *Williams* v. *Rhodes*, 37 LW 4001, October 15, 1968.

In delivering the opinion of the Supreme Court, Judge Black stated in part as follows:

> ". . . In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. . . . Similarly we have said with reference to the right to vote: 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined' . . . . The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote. . . ."

To interpret *R. C. 3513.31* strictly in the situation at hand would be to place a heavy burden on the right to vote. To avoid this pitfall, it is submitted that in this situation *R. C. 3513.31* should be interpreted so as to provide the Democratic party the right to substitute a candidate for Judge Hunter.

Therefore, that part of Relator's petition in prohibition which seeks an order stopping the political party to which Judge Hunter belongs from substituting a candidate by *R. C. 3513.31* should be denied.

Conclusion

The demurrer should be sustained as to all parts of Relator's petition. However, in the event the demurrer is overruled as to that part of Relator's prayer for relief which seeks the withholding of a certificate of nomination to Judge Hunter and an order striking Judge Hunter's name from the ballot for the November election, then the demurrer should be sustained as to that part of Relator's petition which seeks to deny the Democratic Party the right to select a substitute candidate for Judge Hunter.

Respectfully,

David D. Dowd, Jr.
Prosecuting Attorney of Stark County
Attorney for Respondents,
Stark County Board of Elections

Agreed Statement of Fact as Between Relator and John F. Gwin, James Seccombe, Carl F. Wise and Earle E. Wise, Forming the Body Known as the Stark County Board of Elections

It is agreed by and between Harry W. Schmuck, as counsel of record for Roy E. Miller, Relator, and David D. Dowd, Jr., Prosecuting Attorney of Stark County, Ohio, as the Attorney for John F. Gwin, James Seccombe, Carl F. Wise and Earle E. Wise, forming the body known as the Stark County Board of Elections as follows:

(1) That the Honorable Judge Clay E. Hunter was and is a duly elected, qualified Judge of the said Municipal Court of the City of Canton and that his term expires January 2, 1970.

(2) That the Honorable Judge Clay E. Hunter on the 30th day of December, 1968, declared himself to be a candidate for re-election and took out nominating petitions to succeed himself as a Judge on the bench of the said Municipal Court of Canton as a candidate representing the Democratic party and that he filed said nominating petitions with the Board of Elections on the 22nd day of January, 1969.

(3) That thereafter the Board of Elections of Stark County determined that the said nominating petitions filed by the Honorable Judge Clay E. Hunter were in order in that they contained sufficient signatures of registered Democratic voters residing in the jurisdiction of the Canton Municipal Court and that such determination was made by the Board of Elections of Stark County on the 7th day of February, 1969, and duly entered on the minute journal of the Board of Elections of Stark County.

(4) That no other Democratic candidate took out or filed nominating petitions for the position of Judge of the Municipal Court of Canton, Ohio, for the term for which the Honorable Judge Clay E. Hunter declared as a candidate.

(5) That pursuant to the provisions of *R. C. 1901.07* and *R. C. 3513.02* no primary election was held for the purpose of nominating a Democratic candidate for said office and no primary ballots were provided to members of the Democratic party voting in May, 1969, primary. That no opportunity was afforded to the members of the Democratic party residing in the jurisdiction of the Canton Municipal Court and voting in the May, 1969, primary to cast votes for a write-in candidate to represent the Democratic party in the November general election.

(6) That as of the last date for filing petitions for the May, 1969, primary, and up to and through the date of the May, 1969, primary no challenge was filed to the candidacy of the Honorable Judge Clay E. Hunter, nor was any investigation undertaken by the Board of Elections of Stark County to determine the age of the Honorable Judge Clay E. Hunter.

(7) That on July 5, 1968, the Attorney General for the State of Ohio, William B. Saxbe, issued a formal opinion known as Attorney General opinion no. 68-110 to Mr. Ted W. Brown, Secretary of State, Columbus, Ohio, in which the syllabus states as follows:

> "SYLLABUS: A judge who is currently holding office and who otherwise would be eligible for re-election is not disqualified from running for re-election in November, 1968, for the reason that he will have attained the age of seventy years by the time he would assume the office for the term to which he was re-elected."

(8) That on January 15, 1969, Mr. Ted W. Brown as Secretary of State of Ohio issued an information bulletin, a copy of which is attached hereto as Exhibit 1, and in which the following opinion was set forth:

> "It is, therefore, our opinion that a municipal court judge who is presently holding office may be re-elected

at the General Election in 1969 for one additional term for judge of the same court, irrespective of the fact that the judge will be over 70 years of age prior to the time that he will be re-elected to the office."

(9) That the Stark County Board of Elections in response to a directive dated May 5, 1969, from Mr. Ted W. Brown, Secretary of State of Ohio inquired of the Honorable Judge Clay E. Hunter as to his date of birth and has been advised by the Honorable Judge Clay E. Hunter that his date of birth is January 14, 1895.

(10) That the Stark County Board of Elections, despite the instructions contained in *R. C. 1901.07* and *R. C. 3513.02* did not issue a certificate of nomination to the Honorable Judge Clay E. Hunter in February of 1969 after the last day for filing petitions for the May primary had passed.

(11) That as of this date the Honorable Judge Clay E. Hunter has not been removed from the ballot by action of the Stark County Board of Elections nor has the Honorable Judge Clay E. Hunter withdrawn as a candidate for the office of Canton Municipal Court Judge.

Respectfully submitted,

DAVID D. DOWD, JR.
David D. Dowd, Jr.
Stark County Prosecuting Attorney
Attorney for Respondents, Stark
County Board of Elections

HARRY W. SCHMUCK
Harry W. Schmuck
Counsel for Relator, Roy E. Miller

DEPARTMENT OF STATE
STATE OF OHIO
office of
SECRETARY OF STATE

July 7, 1969

Columbus 43215

Stark County Board of Elections
Court House Annex
Canton, Ohio 44702

Attention Mr. John J. Waldeck, Director

Gentlemen:

I am in receipt of your two letters of July 2, one certifying a tie vote on issuing a certificate of nomination to Clay E. Hunter, and the other certifying a tie vote on issuing certificates of nomination to all other successful candidates. I will deal with these tie votes separately.

Clay E. Hunter was not involved in a primary election. Subsequent to the date when a primary would have been held, if his party had been required to participate in one, Clay E. Hunter's name was ruled off the ballot by the Ohio Supreme Court in Action No. 69-321 entitled, The State of Ohio, ex rel. Roy E. Miller v. John F. Gwin, et al.

I am of the opinion that the issuance of the certificate of nomination is a ministerial act to be performed by the Board of Elections. Such act is evidence to the candidate and to the world that the Board of Elections regards such candidate as being nominated. Had Clay E. Hunter not been removed by the Supreme Court as a candidate, he would have been entitled to a certificate of nomination as of the date of the ninetieth day before the primary election in accordance with Section 3513.02 of the Revised Code.

If the Stark County Board of Elections were to issue a certificate of nomination to Clay E. Hunter after the

Ohio Supreme Court has declared that he is not eligible to be a candidate, and after said Court has prohibited the Stark County Board of Elections from placing his name on the ballot, the Board's act could be construed as an act in defiance of the Court's order. It might also accomplish the purpose of misleading the candidate and the voters of Stark County as to the validity of Clay E. Hunter's candidacy. I can see no useful purpose in issuing such a certificate of nomination which may be construed as misleading or an act in defiance of a court order. For this reason I vote "NO" with Carl F. Wise and James Seccombe against John Gwin's motion to issue a certificate of nomination to Clay E. Hunter.

The next tie vote resulted on a motion by Carl Wise that certificates of nomination be issued to all successful candidates who filed expense account statements except Clay E. Hunter, candidate for Canton Municipal Court Judge. As I indicated previously, the issuance of certificates of nomination is a ministerial act performed by the Board. The purpose of the act is to serve notice on the candidate and the voters that those candidates who have complied with the statutes are declared by the Board of Elections to be nominated. I can see no purpose in the Board's refraining from issuing certificates of nomination to those candidates who are entitled; and indeed, I am of the opinion that the Board of Elections would be derelict in its duty if it did not issue such certificates.

Charles H. Morehouse, unopposed American Independent Party candidate, did not file an expense statement, apparently under the belief that he was not required to since there was no primary election contest for his party. I am of the opinion that Charles H. Morehouse is entitled to a certificate of nomination and that he is not required to file a statement of receipts and expenditures in order to obtain such certificate. Section 3513.02 of the Revised

Code provides that the board of elections shall issue a certificate of nomination to candidates who have not participated in a primary election, as if such primary election had been held, and shall declare each such person to be nominated as of the date of the ninetieth day before the day of the primary election date. Section 3517.10 of the Revised Code requires every candidate who received or expended any money in connection with his nomination or election to file a statement of such receipts and expenditures within forty-five days after the election at which he was nominated. We conclude that Charles H. Morehouse was not nominated at an election but was nominated pursuant to the provisions of Section 3513.02 of the Revised Code, as though there was an election, with the time of his nomination being fixed by statute as ninety days preceding the date of the primary election. Therefore, since Charles H. Morehouse's candidacy was not at issue on the date of the primary election, he is not required to file a statement of receipts and expenditures within forty-five days after said election.

We recognize that our decision in regard to Charles H. Morehouse's candidacy is a reversal of our previous position on such candidates, recorded in the March 1, 1959, issue of the Brown Ballot Box, at page 733. A matter which troubled us at that time was moneys which may have been received or expended by a candidate even though a primary election would not be held for such candidate. Such receipts and expenditures would obviously have to be accounted for and reported by the candidate; and we feel that such accounting may be made more logically within forty-five days subsequent to the election at which the candidate has his candidacy at issue.

For the aforesaid reasons we, therefore, vote "YES" with Carl F. Wise and James Seccombe that certificates of nomination be issued to all successful candidates, in-

cluding Charles H. Morehouse, and excepting Clay E. Hunter.

Very truly yours,

TED W. BROWN
Ted W. Brown
Secretary of State

TWB
mm

Stark County Board of Elections
Stark County Courthouse
Canton, Ohio

The undersigned hereby certify that at a meeting held on August 14, 1969 by the duly elected committeemen of the Canton Municipal Court District subdivision of the Stark County Democratic Central Committee, called for the purpose of selecting a candidate for Canton Municipal Court Judge in said Canton Municipal Court District to fill a vacancy created by the Supreme Court of Ohio decision removing the name of Clay E. Hunter from the race, at least 2 days notice of said meeting having been given to each committeeman in said district, the following person was unanimously selected to fill said vacancy:

ANTHONY FLEX
1112 Ellenhurst N.E.
Canton, Ohio

The undersigned further certify that a majority of said committeemen elected JOHN N. MEEKS as chairman of said meeting and elected ROY GUTIERREZ as secretary of said meeting, following which a majority of said committeemen cast a majority vote for the said ANTHONY FLEX as provided in Section 3513.31 of the Revised Code of Ohio.

STATE OF OHIO
STARK COUNTY

JOHN N. MEEKS and ROY GUTIERREZ being first duly sworn, depose and say that they are the duly elected, qualified and acting chairman and secretary respectively of the Democratic Committee Organization of the Canton Municipal Court Subdivision of the Stark County Democratic Central Committee, and that the facts and statements contained herein are true.

JOHN N. MEEKS
ROY GUTIERREZ

Sworn to before me and subscribed in my presence this 14th day of August 1969.

MARGARET L. NEIL
Notary Public

My Commission expires 8-22-72.

I ANTHONY FLEX who reside at 1112 Ellenhurst N. E., Canton, Ohio, in Stark County, Ohio, do hereby accept and consent to be a candidate for the office of Canton Municipal Court Judge and do hereby give my consent and request my name be placed on the ballot for such office, at the general election to be held on November 4th, 1969.

ANTHONY FLEX
Name

AUGUST 14, 1969
Date

DEPARTMENT OF STATE
STATE OF OHIO
OFFICE OF
SECRETARY OF STATE

August 22, 1969

Columbus 43215

Stark County Board of Elections
Court House Annex
Canton, Ohio 44702

Attention Mr. John J. Waldeck, Director

Gentlemen:

I am in receipt of your letter of August 20 posing a tie vote on a motion by Earle Wise "That the name of Anthony Flex be put on the ballot for the November 4, 1969 General Election for Judge of the Canton Municipal Court for the term beginning January 2, 1970." Earle Wise and John Gwin voted for the motion while Carl Wise and Jim Seccombe voted against the motion.

I am in agreement with the reasoning of Carl Wise. Ohio Revised Code Section 3513.31 is controlling as it pertains to the right of parties to fill vacancies created by the withdrawal or death of a candidate. The statute makes no provision for filling a vacancy where the candidate has been found to be ineligible and has been removed by the Supreme Court of Ohio. Judge Clay E. Hunter neither resigned nor died but instead was removed by the Ohio Supreme Court; and consequently, there is no authority under statute which would permit the Democrat Party to fill the vacancy created by his removal.

The federal decisions rendered in the Wallace v. Rhodes case found certain of Ohio's statutes overly restrictive and, therefore, unconstitutional; but Section 3513.31 of the Ohio Revised Code was not one of those statutes affected in the Wallace v. Rhodes decision. It is certainly not the

function of the Secretary of State or the Board of Elections to determine that a statute is unconstitutional as constitutionality may only be determined by a court of competent jurisdiction.

On May 5, 1969, subsequent to the decision rendered by the Supreme Court in the case of Graves v. Brown, I advised boards of elections by directive that those candidates who had been nominated for judicial office and who were 70 years of age or older should be given the opportunity to resign as candidates so that the vacancies created by their resignations could be filled by their political parties. If Clay Hunter had resigned prior to being removed by a decision of the Court or the Board of Elections, his political party could have filled the vacancy created by his resignation in accordance with the provisions of Section 3513.31 of the Revised Code. I would have supported the vacancy being filled under those circumstances. However, I cannot support an effort to fill such vacancy when that vacancy results from the candidate being removed from the ballot by the Ohio Supreme Court.

In my judgment the statute does not authorize filling such vacancy in such instanee. For the aforesaid reasons, I vote "NO" with Carl Wise and James Seccombe against placing the name of Anthony Flex on the November ballot.

If I can be of further assistance, please advise.

Very truly yours,

TED W. BROWN
Ted W. Brown
Secretary of State

OFFICIAL JUDICIAL NON-PARTISAN BALLOT

Canton City

Stark County, Ohio

a. To vote for a candidate place "X" in the rectangular space at the left of the name of such candidate.

b. To cast a write-in vote place "X" in the left blank and write the candidate's name in the space provided.

c. If you tear, soil, deface, or erroneously mark this ballot return it to the precinct election officers and obtain another ballot.

USE "X" ONLY IN MARKING BALLOT

For Judge of Municipal Court

(Full term commencing January 1, 1970)

(Vote for not more than one)

	CHARLES K. CORRELL

For Judge of Municipal Court

(Full term commencing January 2, 1970)

(Vote for not more than one)

	HAROLD E. DeHOFF

Affidavit

John J. Waldeck, of 1524 11th Street, N. W., Canton, Ohio, first being duly sworn, deposes and says as follows:

(1) That he is the duly appointed and qualified Director of the Board of Elections of Stark County, Ohio.

(2) That an election for Judges of the Canton Municipal Court for the terms beginning January 1, 1970, and for the term beginning January 2, 1970, is in process for the general election Tuesday, November 4, 1969.

(3) That the ballot for said election is a double ballot containing both judge's offices for said terms in said district.

(4) That the Stark County Board of Elections has contracted with the Manos Printing Company of Canton, Ohio, for the printing of ballots for said Judicial Election in the amount of 107,530 ballots at the rate of $43.01 per thousand.

(5) That there are approximately 93,547 registered voters in said Canton Municipal Court District.

(6) That there are 301 polling places in said Court District, consisting of seven townships with three cities.

(7) That a special election for said Canton Municipal Court District would include the following items and approximate costs:

1. Minimum of four (4) poll workers for each of the 301 polling places, being 1204 workers at the rate of $18.00 per diem equals	$21,672.00
2. Judges fees being at the rate of $2.00 each for 301 polling places equals	602.00
3. 107,530 ballots at the rate of $43.01 per thousand equals	4,624.00
4. Other election expense consisting of janitor services, rent, mileage, light, heat with average of $10.00 per polling place equals	3,010.00
5. Other election expense consisting of packing suitcases, election supplies, setting up voting booths, legal advertising, extra help for vote talley any final count	4,000.00
TOTAL	$33,908.00

Further, Affiant sayeth not.

JOHN J. WALDECK
John J. Waldeck
Director of Stark County Board of Elections

SWORN to before me this 6th day of October, 1969.

JOAN ZENGLER
Notary Public,
Stark County, Ohio

My Commission Expires 12-8-71